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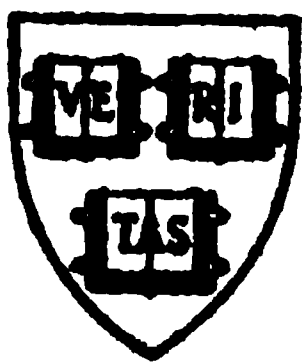
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HAWAII REPORTS

VOLUME 23

CASES DECIDED

IN THE

[SUPREME COURT]

OF THE

TERRITORY OF HAWAII

OCTOBER 12, 1915, TO JULY 13, 1917.

PUBLISHED BY AUTHORITY

(Syllabi of the Cases are by the Court)

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ERRATA.

Page 6, line 11, and page 9, line 21, "intrinsic" read "extrinsic".

Page 59, line 13, "designation" read "distinction".

Page 66, line 6 of opinion, "circuit" read "district".

Page 83, line 9, ninth word, "defendant" read "plaintiff".

Page 266, line 10, "counts" read "grounds".

Page 615, line 21, "20 Haw." read "21 Haw."

JUSTICES OF THE SUPREME COURT

OF THE

TERRITORY OF HAWAII

DURING THE PERIOD COVERED BY THIS VOLUME.

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ALEXANDER GEORGE MORISON ROBERTSON.

ASSOCIATE JUSTICES:

EDWARD MINOR WATSON,
Resigned.

RALPH PETTY QUARLES.

JAMES LESLIE COKE,
Qualified January 13, 1917.

ATTORNEY GENERAL

INGRAM MACKLIN STAINBACK.

CIRCUIT JUDGES

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Resigned.

SAMUEL BARNETT KEMP,

Qualified March 20, 1917.

THIRD JUDGES:

THOMAS B. STUART,

Resigned.

JAMES LESLIE COKE,

Resigned.

WILLIAM H. HEEN,

Qualified May 31, 1917.

SECOND CIRCUIT.

WILLIAM SEABROOK EDINGS.

THIRD CIRCUIT.

JOHN ALBERT MATTHEWMAN,

Term expired.

JAMES WESLEY THOMPSON,

Qualified June 15, 1916.

FOURTH CIRCUIT.

CHARLES F. PARSONS,

Term expired.

CLEMENT K. QUINN,

Qualified April 26, 1916.

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LYLE ALEXANDER DICKEY.

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CASES DECIDED

BY THE

SUPREME COURT

OF THE

TERRITORY OF HAWAII

TERRITORY *v.* HAMAKUA MILL COMPANY.

No. 877.

RESERVED QUESTION FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

SUBMITTED OCTOBER 5, 1915.

DECIDED OCTOBER 12, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—*Sec. 2032 R. L. 1915—construction—ejusdem generis.*

The rule of *ejusdem generis* is applicable in the construction of Section 2032, R. L. 1915, and held, that the words "other food products" are limited to food products of like kind with those expressly mentioned in the statute, and do not include manufactured raw sugar.

OPINION OF THE COURT BY ROBERTSON, C.J.
(Quarles, J., dissenting.)

An information was filed against the defendant corporation charging that it "on the first day of June, A.D. 1915, and for a period of ten months prior thereto, did manufacture and prepare a certain food product, to-wit, sugar, in

Opinion of the Court.

and upon certain premises there situate, which said sugar was then and there intended for sale and for human consumption, without first obtaining a license so to do from the treasurer of the County of Hawaii."

The material facts, which are agreed upon, are as follows: That the defendant corporation is, and for many years has been, engaged in the growing of sugar cane and the manufacture and sale of raw sugar; that such sugar is not a compound, but consists solely of sugar extracted from sugar cane and such impurities as may still be therein by reason of its not having been refined; that such sugar is manufactured primarily for shipment and sale to refineries on the mainland of the United States; that of an annual output of from 7,000 to 10,000 tons of raw sugar from defendant's mill all is exported except about 25 tons which are sold to local people; and that such raw sugar is a food product. The defendant admits that it has not obtained a license under Section 2032 of the Revised Laws, and denies that the raw sugar so as aforesaid manufactured by it is a food product within the meaning of the statute.

Section 2032 of the Revised Laws provides that "No person shall manufacture, compound or otherwise prepare any confections, cakes, bread stuffs or other food products intended for sale and for human consumption in any shop or premises without first obtaining from the treasurer of the county or city and county where such shop, building or other premises are located, a license." Then follow provisions to the effect that no such license shall be granted except upon a certificate from the Board of Health that the premises are in a sanitary and fit condition for the manufacture, compounding or otherwise preparing such food products. Sections 2033 and 2034 prescribe the annual fee for the license and provide the penalty for the violation of the law. And section 2035 excludes from the operation of the statute the manufacture and sale of poi

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and paiai. The circuit court reserved to this court the question whether the defendant is "liable for the payment of the license fee prescribed by the provisions of sections 2032 to 2035 of the Revised Laws, 1915." The question discussed in the briefs and which, evidently, was intended to be reserved, is whether the defendant upon the facts stated, is liable to the penalty for not having obtained a license under the statute.

The county attorney contends that raw sugar is included in the words "other food products" as used in the statute; and that the fact that poi and paiai are expressly excluded from the operation of the statute manifests an intent on the part of the legislature that nothing else should be excepted which falls within the language of the law. Counsel for the defendant contends that the rule *ejusdem generis* applies and that, as raw sugar is not a food product of a kind like any of those expressly enumerated, it does not fall within the purview of the statute. The endeavor is, of course, to ascertain the legislative intent. The query naturally asserts itself, if the legislature intended to include all manufactured, compounded or prepared food products, why were confections, cakes and bread stuffs specially mentioned? The form of expression used in the statute is a time honored one, and has given rise to the rule of construction invoked on behalf of the defendant. The rule of *ejusdem generis* as applied to statutes—that where particular words of a statute are followed by general, the general words are restricted in meaning to objects of like kind with those specified—is founded in reason, and, though a mere rule of construction, is, where proper of application, a potent rule. In the case of *United States v. Stever*, 222 U. S. 167, 174, the supreme court said, "unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described

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by the particular words." And in *City of Chicago v. Ross*, 257 Ill. 76, 79, the court said, "this rule is enforced in the construction of a statute unless there is something in the statute or its context which shows that the doctrine of *ejusdem generis* should not be applied." The rule being so long and so thoroughly established the legislature may well be supposed to have phrased the statute with reference to it. There is nothing upon the face of the statute to indicate that the rule ought not to be applied, or that its application would pervert or obstruct the intention of the law makers. On the other hand, there is a good deal to indicate that the legislature expected that the rule would be applied, and that leads to the conclusion that raw sugar was not intended to be included as a food product within the meaning of the act. The title of the original act, which was Act 117 of the Session Laws of 1911, was "An act to provide for the issuance of licenses for the manufacture, compounding and preparation of *certain* food products;" the things enumerated are infinitesimal in value and extent as compared with the raw sugar manufactured in this Territory; the statute is primarily a measure of sanitation aimed at compounds made by hand or such as are handled after they are made and before or during consumption; the commodities enumerated in the statute are such as are intended to be consumed within the Territory, whereas raw sugar is manufactured principally for export, only a very small proportion—in the case at bar, a fraction of one per cent—being sold for local consumption. And the phraseology "any shop or premises" would hardly have been used if the legislation was intended to refer to such large and important structures as sugar mills. The words "other food products" are doubtless operative to include things similar in kind to "confections," "cakes" and "bread stuffs," such, for example, as pies, candy, and, probably, ice cream. But raw sugar is not of the like kind with any of the things mentioned in the statute.

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We see no force in the contention that the provision of section 2035 that "Nothing in sections 2032-2034 shall be construed to include the manufacture and sale of poi or paiai," points to an intention to include all other food products. "The exception of certain things does not always show that all others are included." 2 Lewis' Sutherland Stat. Con., Sec. 494. This provision, strictly speaking, is neither a proviso nor an exception, but is a declaration of the legislative intent that poi shops were not to be considered as included though poi and paiai might be regarded by the courts (as they seem to have been by the legislature) as food products of a kind like "bread stuffs" and, therefore, within the operation of the act. We perceive no ground for holding that it was intended to enlarge the scope of section 2032.

We are of the opinion that the rule of *ejusdem generis* aids in ascertaining the intention of the legislature with respect to the statute in question, and that its application leads to the conclusion that the manufacture of raw sugar is not within its purview.

The question is answered in the negative.

W. H. Heen, Deputy County Attorney of Hawaii, for plaintiff.

H. Irwin for defendant.

DISSENTING OPINION OF QUARLES, J.

In my opinion the only question in this case is a correct interpretation or construction of section 2032, R.L., which is quoted at length in the majority opinion. In the original enactment of this statute, as well as in the revision (Sec. 2035, R.L.), there is an exception excluding from the operation of the act the manufacture and sale of poi or paiai. As all statutes must be construed for the purpose

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of ascertaining the intent of the legislature in enacting them, we must look to general rules of construction and must endeavor, in the case at bar, to ascertain the intent of the legislature. It is contended, on the one hand, that the rule *ejusdem generis* excludes from the operation of the statute in question all food stuffs not of a kind like "confections, cakes, bread stuffs," and that as raw sugar is not "confections," "cakes" or "bread stuffs," it does not come within the term "other food products" within the meaning of the statute. The rule *ejusdem generis* is generally regarded as an intrinsic aid to the construction of a statute and to apply, unless there is something in the statute which shows that it was not intended to apply, to the particular statute. It is evident to any reasonable mind that poi is not a confection or cake. Whether or not it is a "bread stuff," as used in the statute under consideration, it is not necessary to decide, but inasmuch as it is used with meats and other foods, in the same manner that bread is, there may be some question as to whether or not it is "bread stuff" within the contemplation of the statute. At any rate all will admit that it is a "food product." If the legislature intended to confine the operation of the statute to the manufacture and preparation of confections, cakes and bread they would hardly have used the words "other food products." It is evident that the legislature was of the opinion that poi would come within the terms of the statute, in that it is a food product, and desired to exempt it from the operation of the statute without exempting other food products from the operation of the statute. That the extraction of sugar from the juice of cane is the manufacture of a food product no one will dispute. In arriving at the intent of the legislature we are to consider the entire act—all of its provisions, including exceptions and provisos—then determine as to the enacting clause or main part of the statute itself, and also, as to

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the exception or proviso, just what the legislature intended in each instance.

On behalf of the defendant appellee certain authorities are relied upon, which, in my opinion, do not sustain its contention. For instance, in the case of *Commonwealth v. Dejardin*, 126 Mass. 46, the defendant was charged "with printing and publishing * * * pictures, figures and descriptions of naked girls." The proof showed that he took photographs of two young girls stripped only to the waist. The court held that the proof did not establish the charge made in the indictment and that the maxim *noscitur a sociis* applied to that case. In other words, the court there held that a word is best understood by the meaning of associated words. In *Joplin v. Leckie*, 78 Mo. App. 8, the charter of the city authorized it to levy an occupation tax upon manufacturing corporations, and the court held that this did not authorize the levy of the tax upon private parties engaged in manufacturing. In *Rohlf v. Kasemeier* (Ia.), 23 L. R. A. N. S. 1284, the case is summed up in the syllabus as follows: "Personal services of a physician are not a commodity within the meaning of a statute relating to pools and trusts, and making guilty of a conspiracy persons who combine to regulate or fix the price of any article of merchandise or commodity or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in the state." The court simply held that professional services were not an article of merchandise or a commodity,—a very wise conclusion.

"An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions, the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law and enumeration weakens it as to things not expressed." 2 Lewis' Sutherland, Stat. Con.,

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Sec. 494. "The legislature has prescribed a general rule, with special disabilities or privileges, and these cannot be enlarged or extended to objects not embraced in the exception by mere implication or from parity of reason." *Tyson v. Britton*, 6 Tex. 224. "Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms." *United States v. Dickson*, 15 Pet. 165. When a general rule has been established by statute, with exceptions, the courts will not curtail the rule nor add to the exceptions by implication. *Roberts v. Yarboro*, 41 Tex. 452; *Wallace v. Stevens*, 74 Tex. 559. An exception to a general provision is to be strictly construed, and as taking no case out of the enacting clause which does not fairly fall within the terms of the exception. *United States v. Ewing*, 140 U. S. 142, 148; *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1. The provisions contained in an exception or proviso are to be construed by the same rules as the provisions of the enacting clause. *United States v. Whitridge*, 197 U.S. 135. A proviso or exception is properly referred to to aid the construction of the enacting clause, and this may be done although the proviso has been repealed. *Alexander v. Alexandria*, 5 Cranch 1, 8; *Brewer v. Blougher*, 14 Pet. 178; *Thaw v. Ritchie*, 136 U. S. 519, 542; *Arnold v. United States*, 147 U. S. 494, 499; *Austin v. United States*, 155 U. S. 417, 431. The exception of a particular thing from general words marks their extent and proves that, in the opinion of the legislature, the thing excepted would be within the general clause had the exception not been made. *Arnold v. United States*, 147 U. S. 494, 499; *Brown v. Maryland*, 12 Wheat. 419, 438; *Pott v. Arthur*, 104 U. S. 735. In *Gibbons v. Ogden*, 9 Wheat 1, the court, at page 191, said: "It is a rule of construction, acknowledged by all, that the exceptions from a power mark its

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extent, for it would be absurd, as well as useless, to except from a granted power that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.”

If the legislature understood that the manufacture and preparation of poi for sale was the manufacture and preparation of a food product, it is very clear that they also understood the manufacture of raw sugar to be the manufacture of a food product. Having expressly excepted poi from the operation of the statute and remained silent as to the manufacture of sugar, we should not conclude that they intended to exclude sugar also. This would be interpolating into the statute an exception not provided for by the legislature itself, and, to my mind, contrary to the manifest intent of the legislature.

The rule of intrinsic aids to statutory construction, invoked in this case, *ejusdem generis*, and the exclusion of things not named, are mere aids to construction, and must be considered, in the light of rules of construction affecting them, as shown by the authorities cited herein, which, of course, are only a few bearing upon the principle involved, and which, in my opinion, establish that raw sugar is a food product within the meaning of the statute under consideration, and the manufacture of the same subject to a license fee of \$10. In my opinion it is not proper to construe the statute by the extrinsic fact that the great bulk of the sugar manufactured is shipped out of the Territory, and that only a small per cent—25 tons—is sold and consumed in the vicinity of the defendant's sugar mill. When we come to think of it, 25 tons of sugar consumed in one

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vicinity, comprises a considerable quantity of food products, and if the same ratio existed throughout the Territory it would show a very large consumption of raw sugar by the inhabitants of the Territory, to guard whose health it is more than probable that the statutes under consideration were enacted. The purpose and object of the statute under consideration is to benefit the health of the citizen by providing for an inspection of premises where food products are manufactured, prepared or sold. Hence it is not to be considered as a revenue measure. The same session of the legislature that enacted this statute enacted another one (Act 101, S. L. 1911) providing for the inspection and regulation of places where poi or paiai is manufactured, prepared or sold, but without requiring a license fee of those engaged in the business of manufacturing, preparing or selling poi or paiai. To my mind it is not reasonable to suppose that the legislature intended that the places where other food products, including poi or paiai, are manufactured, prepared or sold should be under regulations insuring good sanitation, without providing for the inspection of sugar mills to the end that sugar mills should also be kept in a good sanitary condition. The exception of poi or paiai from the operation of the statute in question, and which virtually exempts it from the license fee of \$10, I think clearly shows that the legislature did not intend to confine the operation of the statute to places where confections are manufactured, compounded, or prepared, and to bakeries. I do not think that the legislature intended that the statute should apply only to candy shops and bakeries.

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IN THE MATTER OF THE ESTATE OF JAMES
OSWALD LUTTED, DECEASED.

No. 873.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED OCTOBER 2, 1915.

DECIDED OCTOBER 18, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EXECUTORS AND ADMINISTRATORS.

L, on the 26th day of July, 1913, devised and bequeathed specific real and personal property to B, and appointed her sole executrix "as respects this property only." In August, 1913, he made another testamentary paper "ratifying and confirming" all that was done by the prior instrument, in which he devised and bequeathed to S all personal, real and mixed property of which he died possessed, either in the Territory of Hawaii or elsewhere, "except as willed and bequeathed as aforesaid," and appointed said S executrix of said "last will and testament, except as aforesaid." Held that the two instruments were properly admitted to probate as the will and codicil of the testator; that the second appointment (or attempted appointment) of an executrix was no revocation of the first, and that S was not entitled to receive the appointment as sole executrix.

Same—probate procedure.

Under our system of probate procedure, as prescribed by statute, the appointment of different executors in this Territory, each having separate and distinct duties with respect to property of an estate lying in this Territory, is not permissible.

Same—appointment of administrator with will annexed.

Under the facts in this case, held that the appointment of a disinterested person as administrator with the will annexed was proper,—the question of the right of priority in the matter of such administration not being raised or passed upon by the court.

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OPINION OF THE COURT BY WATSON, J.

This is an appeal from an order made by a circuit judge, sitting at probate, granting letters of administration with the will annexed. James Oswald Luttet, a resident of the city and county of Honolulu, died in Honolulu on or about May 4, 1915, leaving two written instruments, dated July 26 and August 2, 1913, respectively, which, together, disposed of his entire estate. In the former the testator devised and bequeathed to one Jennie Blythe Brown "outright and free" certain Kapaa homestead lots, together with the buildings thereon, growing crops, live stock, tools, machinery, and contracts and agreements in connection with the same, and appointed said Jennie Blythe Brown sole executrix without bond "as respects this property only." In the latter, the testator, "ratifying and confirming all that was done by another instrument and will by me made and executed on the twenty-sixth day of July, Anno Domini, 1913," devised and bequeathed unto his daughter, Gertrude Marie Sledge, all personal, real and mixed property of which he died possessed, either in the Territory of Hawaii or elsewhere, "except as willed and bequeathed as aforesaid," and appointed the said Gertrude Marie Sledge executrix of said "last will and testament, except as aforesaid." The two instruments, each of which was duly attested by two subscribing witnesses, the first by P. H. Burnette and A. T. R. Jackson, as witnesses, and the second by said P. H. Burnette and Gillis Goodman, as witnesses, read as follows, omitting in each the signature of the testator and the attestation clause:

The first:

"Be it remembered, I, James Oswald Luttet, of the City and County of Honolulu, Territory of Hawaii, being now 69 years of age past, and of sound and disposing mind, memory and understanding, and a widower, do make and

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declare this my last will and testament, hereby revoking any and all other wills or testaments by me heretofore made in so far as the property hereby bequeathed is concerned.

"First: I direct that my just debts and funeral expenses be paid first.

"Second: In consideration of tender and loving services rendered me by (Mrs.) Jennie Blythe Brown, (widow), of Honolulu, Territory of Hawaii, during the past year and throughout my severe illness, which were gratuitously and sisterly rendered, I do hereby will and bequeath unto her the said Jennie Blythe Brown, widow, outright and free the following real and personal property, to wit: All of Lots 140, 144 and 145 of Kapaa Homestead Lots, at Kapaa, Kauai, Territory of Hawaii, together with all buildings thereon, growing crops, live stock, tools, machinery and contracts and agreements, if any there be in connection with the same.

"Third: I hereby appoint my beloved friend (Mrs.) Jennie Blythe Brown, widow, aforesaid, my sole executrix, without bond, as respects this property only.

"In witness whereof, I hereunto set my hand and seal, at Honolulu, aforesaid, this twenty-sixth day of July, Anno Domini, 1913."

The second:

"Be it remembered, I, James Oswald Luttet, of Honolulu, Territory of Hawaii, widower, age 69 years past, being of sound and disposing mind, memory and understanding, do make and declare this my last will and testament, but, hereby ratifying and confirming all that was done by another instrument a will, by me made and executed on the twenty-sixth day of July, Anno Domini, 1913, whereby I did will and bequeath unto Jennie Blythe Brown, widow, of Honolulu aforesaid, all of Lots 140, 144 and 145 of Kapaa Homestead Lots, at Kapaa, Kauai, Territory of Hawaii, together with all improvements thereon, the growing crops, live stock, machinery, tools, etc.

"I will and bequeath to my beloved daughter Gertrude Marie Sledge, the wife of John Sledge of Spokane, State of Washington, being my only heir-at-law, all personal, real

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and mixed property that I may die possessed of either in the Territory of Hawaii or elsewhere, except as willed and bequeathed as aforesaid, including shares in corporations, cash in hand and on deposit in banks, personal jewelry and other effects.

"I do hereby appoint Gertrude Marie Sledge, my daughter aforesaid, my sole executrix of this my last will and testament, except as aforesaid, and she to serve without bond.

"In witness whereof, I, James Oswald Luttet, the testator, have to this my final will, written on this one sheet, set my hand and seal this second day of August, Anno Domini, 1913."

After the death of the testator the appellant (Mrs. Gertrude Marie Sledge) presented the two instruments for probate with a petition that she be appointed sole executrix of the estate. The court admitted the two instruments to probate as the will and codicil of the testator and granted letters of administration with the will annexed to one E. A. C. Long, a disinterested person, and denied the appellant's petition for letters testamentary. From this order the present appeal is taken, the principal contention of the appellant being that her nomination as executrix by the instrument dated August 2, 1914, must be considered by the court "as controlling, and constituting legally a revocation of the earlier appointment of Mrs. Brown." The complete answer to this contention is, that in the second instrument, which was treated by the circuit judge (we think properly) as a codicil to the will of July 26, 1913, the testator expressly ratifies and confirms all that was done by him in the previous instrument (the will made by him on July 26, 1913), and the appointment of appellant as executrix is specifically limited so as not to interfere with the appointment of (Mrs.) Jennie Blythe Brown as executrix of the property devised to her. The phraseology of the documents makes this point absolutely clear. The will (dated July 26, 1913,) provides, *inter alia*:

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"I hereby appoint my beloved friend (Mrs.) Jennie Blythe Brown, widow, aforesaid, my sole executrix, without bond, as respects this property only."

The second instrument (dated August 2, 1913,) provides, *inter alia*:

"Be it remembered, I, James Oswald Luttet, of Honolulu, Territory of Hawaii, widower, age 69 years past, being of sound and disposing mind, memory and understanding, do make and declare this my last will and testament, but, *hereby ratifying and confirming all that was done by another instrument a will, by me made and executed on the twenty-sixth day of July, Anno Domini, 1913, * * **

"I do hereby appoint Gertrude Marie Sledge, my daughter aforesaid, my sole executrix of this my last will and testament, except as aforesaid, and she to serve without bond."

There is no conflict or inconsistency between the provisions of the two instruments, either in the matter of the disposition of the testator's property or in the nomination of executrices, and we are of the opinion that there is no merit in this first contention of appellant's, that her appointment in the instrument dated August 2 operated as a revocation of the appointment of Mrs. Brown made in the earlier instrument. We think the intention of the testator, to be gathered from the two instruments, is clear, that he desired Mrs. Brown to be appointed the executrix of that portion of the estate devised and bequeathed to her and Mrs. Sledge to be appointed executrix of the entire residuary estate, devised and bequeathed to her by the instrument of date August 2, 1913. Appellant was not entitled to receive the appointment as sole executrix, as prayed for by her.

Secondly, it is contended by the appellant that should the court hold she was not entitled to receive letters testamentary as sole executrix, the court below should have appointed two executrices (herself and Mrs. Jennie Blythe Brown), "each having separate and exclusive control over

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that portion of the property of the deceased, within the jurisdiction of the court, intrusted to her under the will." On that point the circuit judge, in his written decision on petition for probate, said:

"The net result of the two documents, as regards nomination of some one to execute the will, is that there are two such nominations, but they are separate, and not joint. That is, one executrix so nominated is expressly confined to the execution of the will so far as it relates to certain real estate thereby devised; and the other is likewise limited in the scope of her duties, by the exception last above discussed. While there may be any number of joint executors, or executrices, and while there may even be separate executors, to act in different countries, or even in different States of the Union, I have yet to find a case where two or more such executive officers have been appointed under one will, and with limited and distinct powers and duties, with respect to property of an estate lying within one jurisdiction.

"It is therefore my opinion that the two instruments so executed by Luttet neutralize each other with respect to the appointment of an executrix, and that neither of the ladies named can be appointed executrix of the will and codicil, without doing violence to very expressly stated wishes of the testator. In this posture of events, it becomes the duty of the court to appoint an administrator-with-the-will annexed, and Mr. Elia A. C. Long will, (unless some good reason to the contrary be shown,) be so appointed, and will receive letters of administration with the will annexed, upon filing an approved bond in the sum of five thousand dollars (\$5,000.00)."

This decision of the circuit judge was filed on July 10, 1915, and thereafter, on July 13, 1915, an order admitting the two instruments to probate was duly made and entered, wherein it was further ordered "that letters of administration with the will annexed issue to Elia A. C. Long in accordance with the decision on petition for probate," hereinabove quoted from. From the record before us it does not appear that the appointment of Long was objected

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to, or that the appellant, or any other person, claimed the right to administer; and no question is raised as to the applicability of section 2490, R. L., 1915, touching the right of priority in the matter of the appointment of an administrator.

After careful consideration we are of the opinion that the views expressed by the circuit judge are correct,—that different executors may not be appointed as to different parts of a testator's estate in this jurisdiction. This view is in seeming conflict with certain general expressions found in the books, wherein it is stated, as in *Hunter v. Bryson*, 25 Am. Dec. 313, 316 (cited in appellant's brief), that:

"A testator may appoint different executors, in different countries, in which his effects may lie; or different executors as to different parts of his estate in the same country." See also 18 Cyc., p. 74, n. 6.

From an examination of the case of *Hunter v. Bryson*, *supra*, and the cases referred to in Cyc., n. 6; *supra*, it appears that all were cases of administration in separate jurisdictions, and in the *Bryson* case the statement of the court above quoted, with respect to the appointment of different executors as to different parts of the estate in the same country, was *dicta*. In the case of *Geaves v. Price*, 3 Swab. and T. 71, it appears from the syllabus that the testator, "D., on the 3rd of January, 1853, devised and bequeathed all his real and personal estate to P., and appointed him 'sole executor of this my will.' In March, 1862, by a paper purporting to be his last will, he devised and bequeathed two houses as described, and their appurtenances to G, and made G. 'sole executor of this my will.'" Under the facts stated the court held that the two executors were jointly entitled to probate of both papers. In the case at bar it is evident from a reading of the two instruments that the appointment of Mrs. Sledge and Mrs.

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Brown as joint executrices would not effectuate the intention of the testator, and we are of the opinion that the probate court would not have been justified in decreeing that they take probate jointly. We are further of the opinion that the appointment of different executors in this Territory for different parts of a testator's estate situate in this jurisdiction would be inconsistent with such statutory provisions as are in force here relating to probate procedure and providing for notice to creditors, the filing and allowance of claims, the sale of property for the payment of debts, etc. (Chap. 141, R.L. 1915). It is conceded by counsel for both parties that great confusion would result in this case from the appointment of the two executrices, and counsel for appellant state, "We certainly have been unable to find any authorities sustaining such an absurd situation." In Redfield on the Law of Wills, Part II., p. 65, we find the following statement which is quoted *in extenso* by counsel for both parties, seemingly with approval:

"The testator may also commit the execution of his will in different countries to different executors; or the duties may be divided among different executors with reference to the subject matter, it has been said, but Lord Hardwicke expresses an opinion that such an appointment would be absurd, because executors must act jointly and each have authority as to the whole estate, 'which cannot be divided into distinct and separate powers.' And we think the American practice confirms the views of his lordship thus expressed," citing *Owen v. Owen*, 1 Atk. 494.

We think that under our system of probate procedure, as prescribed by statute, the appointment of different executors in this Territory, each having separate and distinct powers and duties with respect to property of an estate lying in this jurisdiction, is not permissible. Our conclusion is that the appointment of an administrator with the will annexed was, under the circumstances, proper,

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and no question being raised as to any supposed right of priority in the matter of such appointment we feel that we should not disturb the order made by the circuit judge, in the exercise of his undoubted jurisdiction, appointing Mr. Long.

The order is affirmed.

E. C. Peters for appellant.

Thompson, Milverton & Cathcart for appellee.

DONG YOU, ET AL. v. WING HING COMPANY,
LIMITED.

No. 839.

MOTION FOR SUMMARY JUDGMENT.

ARGUED OCTOBER 25, 1915.

DECIDED OCTOBER 26, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

Per curiam. December 5, 1914, the plaintiffs recovered a judgment against the defendant for \$1,901.41 and \$184.09 costs. From said judgment defendant sued out a writ of error in this court. The case having been argued and submitted, the opinion of this court affirming the said judgment was filed July 12, 1915, and in accordance therewith the judgment of this court affirming the judgment of the circuit court was entered on the 27th day of July, 1915, and notice of said judgment was regularly transmitted to the judge

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of the circuit court on the same day. September 29, 1915, the plaintiffs filed their motion for judgment upon the bond given by the defendant (both against the principal and sureties) to procure the writ of error out of this court for the amount of said judgment and costs, less \$1,500 paid thereon after the affirmance of said judgment, and this motion has been argued and submitted and is now before us for decision. The plaintiffs base their right to summary judgment upon said bond against the principal and sureties by reason of the provisions of section 2544 R.L., wherein it is provided that "Summary judgment may be rendered in any proper case * * * against the principal or principals and surety or sureties on any bond for costs or appeal bond, by either the appellate court or the trial court as the case may be," etc. This statute was enacted in 1907 (see Act 63, S. L. 1907), the title reading: "Relating to Costs of Court." Section 2538 R.L., under the title "Appeals, Exceptions, Error," provides that "Whenever any person for whose benefit such bond has been filed shall be entitled to a recovery thereunder, an action may be brought in the appropriate court," etc. Section 2544 R.L., originally enacted under the said title, is found in the Revised Laws in chapter 143, entitled "Costs." We construe section 2544 as providing a remedy upon bonds for costs only. We are of the opinion that the legislature did not intend to provide for a summary judgment against the sureties in a bond of the kind before us, but that an action should be brought thereon wherein the sureties might avail themselves of any defense which might exist. This construction gives to section 2538 the full effect which the legislature apparently intended that it should have, and gives to section 2544 that effect which the legislature evidently intended it should have. The motion of the plaintiffs for summary judgment against the principal and sureties is therefore denied. If the plaintiffs were entitled to

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the relief sought by this motion the circuit court would be the appropriate court in which to make the motion.

Motion denied with costs of motion to the defendant.

R. J. O'Brien for the motion.

J. Lightfoot contra.

LEWERS & COOKE, LIMITED, A CORPORATION v.
ARTHUR H. JONES, JULIETTE M. JONES AND
D. TURIN.

No. 868.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED OCTOBER 15, 1915.

DECIDED OCTOBER 26, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MECHANICS' LIENS—*fraudulent conveyances.*

A voluntary conveyance, by the owner of a lot upon which he has erected a building, to his wife (through an intermediary), made for the purpose of defeating the right of a material man who has furnished materials used in constructing such building, is void, at law and in equity, as against a lien for such materials, proper notice of which was filed within the time required by statute, and it is not necessary to resort to equity to procure the cancellation of such deed in order to enforce the lien for such materials.

OPINION OF THE COURT BY QUARLES, J.

This case comes before us on reserved questions arising upon the demurrer of the defendants to the amended complaint of the plaintiff. Facts are alleged in the amended

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complaint which show that plaintiff furnished to a contractor materials to be used in the construction of a building for the defendant Arthur H. Jones; that the said building was completed on the 28th day of September, 1914; that the land upon which the building was erected was deeded October 8, 1914, by the said defendant to one Anderson, who, on that day, deeded the same to the defendant Juliette M. Jones, wife of defendant Arthur H. Jones; that on the 5th day of November, 1914, plaintiff filed a notice of lien, in proper form, as required by law, in which it claimed a lien upon the said building and lot upon which it was erected. After alleging the making of the said deeds the amended complaint alleges: "That said conveyances from the said defendant Arthur H. Jones to David Anderson, and from David Anderson to Juliette M. Jones aforesaid, were and are respectively without consideration and fraudulent and void, and were made by the respective grantors therein and were received by the respective grantees thereunder with the intent and for the purpose of hindering and defrauding and delaying the plaintiff and other laborers and materialmen entitled to enforce a lien for the labor and material respectively performed and furnished to, for and upon said building, from enforcing his and their lien upon the said building and the interest of the owner Arthur H. Jones aforesaid in the premises upon which the same was situate." To the amended complaint the defendants filed a demurrer raising a number of questions, whereupon the circuit judge reserved to this court the following questions:

"I. Can the circuit court enforce a mechanic's lien against property in the name of an ultimate assignee, where the mesne assignments thereof from the owner (at the time the material was furnished) were made prior to the filing of the lien but were without consideration and fraudulent and made and received with the intent to hinder, delay and

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defraud laborers and materialmen, including plaintiff, from filing their respective liens against said property; and

“II. Can the circuit court exercise equitable jurisdiction in the action to enforce the lien to the extent of giving the materialman under such circumstances relief against such alleged fraudulent conveyances; or

“III. Must the materialman first go into equity and seek the cancellation of the alleged fraudulent conveyances before further proceeding in his action to enforce the lien?”

The first question must be answered affirmatively. The deed from Mr. Jones to Anderson and the deed from the latter to Mrs. Jones must be regarded as one transaction and as a voluntary deed from husband to wife through an intermediary. The demurrer confesses the truth of all material allegations of the amended complaint, and for the purposes of the demurrer it must be regarded that these deeds were voluntary and were made with the fraudulent intent to defraud the plaintiff and prevent it from perfecting and enforcing a lien against the building and lot upon which the building was erected for the materials furnished by plaintiff and used in constructing the said building. The law, under the circumstances alleged in the amended complaint, regards the said deeds as void, both at law and in equity, and this rule is well established in this jurisdiction (*Dee v. Foster*, 21 Haw. 1, and authorities therein cited).

It is also settled by the decision in *Dee v. Foster, supra*, that a party in a law action may show that a deed is fraudulent and made with intent to defraud creditors or other interested parties without first resorting to a court of equity to have such deed adjudged fraudulent and void. This rule is well established by authority, both English and American, and is consonant with reason and justice. Said deeds must be regarded as having been made for the purpose of defeating the claim of the plaintiff and its right to

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file and enforce a lien for the materials furnished by it, for the purposes of the said demurrer, and must be regarded as void and of no effect whatever. This would leave the plaintiff in the same condition as if the said deeds had not been made.

The second question is not properly stated. Holding the said deeds to be void for the reasons alleged in the amended complaint is not exercising exclusive equitable jurisdiction.

The answers to questions I and II furnish the correct answer to question III, namely, that it is not necessary under the facts alleged in the amended complaint for the plaintiff to first go into a court of equity to have the deeds attacked canceled.

Counsel for the defendants filed an exhaustive and able brief and argued the questions reserved with much force and learning, but failed to convince the court that where a deed is made to defraud a party having a right in and to the property sought to be conveyed by such deed, that such party must first go into equity to have the deed canceled before proceeding to enforce a legal right in an action at law. This contention assumes that the void deeds, in question here, have force and effect, and conveyed the title to the building and lot in question to Mrs. Jones as against the right of the plaintiff,—a contention which cannot be sustained.

In *Hooker v. McGlone*, 42 Conn. 95, the court, at page 102, says: "In the present case McGlone owned the building, and as that was erected by the consent of the owner of the land, he had also a qualified interest for the time being in the land itself. We think that the lien attached to the building and to the interest, such as it was, which he had in the land, and ought to be enforced as against him. When he purchased the land, had he become the owner of the legal title, his equitable interest in the building and land would have merged in his legal title, and the whole would

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have been subject to the lien. The deed to the wife must be regarded as in the nature of a voluntary conveyance from her husband to her, and therefore the legal title in her is subject to the same equities that it would have been subject to in him. It would be manifestly unjust to allow the husband to defeat the petitioner's claim by the mere circumstance of taking a deed in his wife's name instead of his own. As she paid nothing for the land we do not see how she can complain if the land, as well as the building, is appropriated to the payment of her husband's debts."

The reserved questions are answered as follows:

I. Yes.

II. The court can give the plaintiff the relief prayed by enforcing its lien, holding the deed from Mr. Jones to Anderson and the deed from Anderson to Mrs. Jones as fraudulent and void, without exercising exclusive equitable jurisdiction.

III. No. It is not necessary for the plaintiff to resort to equity to procure the cancellation of the said deeds before proceeding in its action to enforce its lien.

R. J. O'Brien (*E. C. Peters* with him on the brief) for plaintiff.

A. M. Cristy (*Frear, Prosser, Anderson & Marx* with him on the brief) for defendants.

Syllabus.

ELIZABETH K. PILIPO AND ESTHER N. PILIPO v.
NETTIE L. SCOTT.

No. 876.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED OCTOBER 18, 1915.

DECIDED OCTOBER 27, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

JUDGMENTS—*res judicata*.

A fact or question in issue and litigated in a former action between parties is conclusively settled by the judgment therein and they are bound by the adjudication in another action between them though the cause of action or subject matter be different.

APPEAL AND ERROR—*instructions—harmless error*.

Where on the trial of an action at law the evidence is such that the verdict must necessarily be for the plaintiff, errors in the giving or refusing of instructions which do not affect the measure of damages are harmless.

OPINION OF THE COURT BY ROBERTSON, C.J.

On January 28, 1915, the plaintiffs commenced an action in the circuit court against the defendant to recover the sum of \$2703 rent alleged to be due and unpaid under a lease of certain interests in the land of Holualoa, island of Hawaii, dated August 21, 1894, covering the period from September 1, 1905, to March 1, 1914. The jury rendered a verdict for the plaintiffs for the sum of \$1908, the amount of six years' rent. The defendant brings a bill of exceptions to this court. Much litigation has grown out of the lease in question, and cases between these parties which have reached this court are reported in 13 Haw. 632; 21 Haw. 609, 766, and 22 Haw. 174, 412. We have heretofore said and reiterated that the failure of the lessors to deliver

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possession of the land, or the inability of the lessee to get possession, if proven, would constitute a defense to an action at law for the recovery of rent under the lease. 21 Haw. 769; 22 Haw. 181, 413. And in view of the discussions in the opinions referred to as to the relations of these parties and their respective rights and obligations under the lease it would be supposed that in another case the facts would have been shown with care and thoroughness and the contentions presented with clearness and precision. The defendant's answer was a general denial with notice that the defendant "also relies on the defense of the statute of limitations and on the defense of eviction from the demised premises." The case was tried with considerable looseness, much of the testimony having relation to circumstances connected with the suit for the partition of the land, to which suit some of our prior opinions have referred. But the matter of the partition was left by the evidence in a position which rendered it of no practical value so far as the issues sought to be presented in this case were concerned, and the defendant seems to attach little, if any, importance to them except in connection with her exceptions to certain instructions given or refused. It seems that the partition, so far as it related to the allotment to the plaintiffs, was substantially completed in 1913. But there was no evidence to show whether the defendant's interest as lessee of plaintiffs was protected in the partition, or, if not, whether any demand to be let into possession of the land set off to the plaintiffs was made by the defendant, or whether any other attempt to obtain possession has since been made by her. M. F. Scott, the defendant's husband, appeared in the dual capacity of the only witness for the defense and sole counsel for the defendant, and this did not tend to clarify the presentation of the case but rather to confuse it. From the transcript of the proceedings it is difficult to determine as to some of the

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things said by Mr. Scott whether they were intended to be testimony of the witness or remarks of counsel. Mr. Scott, testifying as a witness for the defense, in support of the claim of eviction, proceeded to state that upon obtaining the lease the defendant entered upon the land and began to clear it, and repaired the fences; that in 1895 the plaintiffs "claimed quite a patch" upon which coffee trees were bearing and gathered the crop, and that they leased a portion of the area claimed to have been taken into possession by the defendant to a Japanese. Counsel for the plaintiffs objected to this line of testimony upon the ground that the matters mentioned by the witness were *res judicata*, they having been shown in evidence in a former action between these parties. Counsel was referring to the trial of the case afterwards reported in 21 Haw. 609, wherein it was held that the acts referred to did not constitute an eviction because, upon conflicting evidence, it had been determined that as to those specific portions of the land the defendant had never been in possession. The record in the former case was not produced, but it was admitted by the defendant's attorney that upon such former trial the acts in question had been decided not to have constituted an eviction of the defendant. In the course of the argument which followed counsel for the defendant endeavored, without much success, to explain his position with reference to the facts he intended or claimed the right to show. His position seems to have been that though the facts he sought to testify to were the same as were in evidence in the prior trial, yet as they had continued past the period for which rent was claimed in that action into and during the period covered by the present action, they should be regarded as having the effect of acts of eviction committed during the latter period and, therefore, constituting a defense to the present claim. Referring to the fact that the prior case had been decided against the defendant upon conflicting testimony,

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counsel said "Now I am going to see what this jury think about it. We are going to have the same facts." There was no merit in that position for the reason that those acts which did not in their inception constitute eviction (because the defendant had never acquired possession of the parcels in question and the plaintiffs had rights in the land as owners of shares in the hui) could not by reason of their continuance be held to have become such. At the conclusion of the argument the court expressed the view—alleged by defendant to have been erroneous—that the prior adjudication concluded the defendant not only as to the facts that were in dispute and actually litigated but also as to such other facts as could have been pleaded in the former action. No evidence of any such other facts was offered. The ruling was evidently intended—and its effect was—to sustain the plaintiffs' objection. An exception was noted for the defendant, the bill of exceptions (exception 1) stating that "M. F. Scott, a witness for defendant, being at the time on the witness stand, defendant made offer of evidence to prove facts claimed by defendant to constitute evictions ascribable to lessors." This, we understand, had reference to the alleged acts of eviction which the witness was testifying to when he was interrupted by the objection of plaintiffs' counsel. The ruling was correct as applied to the facts to which the witness was testifying. It is well settled that a fact or question in issue and litigated in a former action between parties is conclusively settled by the judgment therein and they are bound by the adjudication in another action between them though the cause of action or subject matter be different. 23 Cyc. 1215; *Cromwell v. Sac. Co.*, 94 U. S. 351; *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 14 Haw. 50, 54. But counsel for the defendant now contends that upon the trial he made an offer of proof of acts to show eviction which occurred subsequent to the period for which rent was claimed in the former action

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(1902-1905) and of acts done prior thereto but which were not litigated in the former action, which offer was refused by the court and the evidence excluded by the ruling made as above stated. In this the record does not sustain him. The record does show that after the objection was interposed, the ruling made and the exception noted as above shown, the court asked Mr. Scott to "state those facts separately which you claim have arisen since the last action that amounts to an eviction or to a defense." In response thereto Mr. Scott stated that since 1905 Miss Pilipo had sold a piece of the land to Dr. Haida, and had sold her interest in a 1000 acre tract "above the road" to Mr. Aiu, and that all of the hui land above the 1000 acre tract had been sold in 1907. As just stated, this was brought out by the request interposed by the court. Evidently it was not regarded as an offer of proof by anyone concerned. The court had already made it clear that evidence of acts of eviction occurring subsequently to the period involved in the prior case would be admitted. No objection was made by counsel for the plaintiffs to the reply made to the court, hence there was no ruling made by the court nor exception noted by the defendant. The matter went no further, and there was nothing to except to.

There were several exceptions to instructions given to the jury and to the refusal to give certain instructions requested by the defendant. It will not be necessary to consider them. As the evidence stood at the close of the case the verdict must inevitably have been for the plaintiffs. The non-payment of the rent was admitted, and, aside from the pleading of the statute of limitations, the effect of which was to limit the amount of the recovery to six years' rental, there being no evidence of eviction, no defense was shown. Here, then, as in the former action (21 Haw. 609), the only defense relied upon having failed of establishment, the plaintiffs were entitled to recover. The evidence being

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such that the verdict must necessarily have been for the plaintiffs whatever errors, if any, were committed in the giving or refusing of instructions, none of which affected the measure of damages, were obviously harmless.

Mr. Scott testified that since the year 1900 the defendant has had no beneficial use of any land under her lease. If this is so, and the fact is not attributable to the neglect or other fault of the defendant, it certainly is a great hardship that she should continue to be held liable for the rent reserved in the lease, and under such circumstances there ought to be some remedy in the premises. There are indications, however, that the defendant has failed to assert and protect her rights in a proper manner and at the proper time. Be that as it may, so far as the present exceptions are concerned we are obliged to decide them upon the record as it was made in the trial court and is presented to this court for review.

The exceptions are overruled.

E. K. Aiu (*N. W. Aluli* with him on the brief) for plaintiffs.

M. F. Scott for defendant.

Syllabus.

JOHN F. COLBURN v. WM. L. WHITNEY, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, JESSIE K. KAAE, INDIVIDUALLY AND AS EXECUTRIX UNDER THE WILL AND OF THE ESTATE OF MARGARET V. CARTER, DECEASED, JOHN C. LANE AND JUNIUS KAAE, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF MARGARET V. CARTER, DECEASED, ALBERT B. CARTER, THOMAS J. CARTER, HENRY C. CARTER, WM. L. CARTER, EUNICE K. CARTER, ALBERT B. CARTER, A MINOR, BY HIS GUARDIAN, EDGAR HENRIQUES, RICHARD N. K. CARTER, A MINOR, BY HIS GUARDIAN, EDGAR HENRIQUES, BEATRICE K. CARTER, A MINOR, BY HER GUARDIAN, EDGAR HENRIQUES, HARRIET CARTER, A MINOR, BY HER GUARDIAN, EDGAR HENRIQUES, AND ANTONINO A. LONG, AND W. J. ROBINSON, FORMERLY THIRD JUDGE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

No. 865.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED NOVEMBER 1, 1915.

DECIDED NOVEMBER 8, 1915.

ROBERTSON, C.J., AND WATSON, J.

COURTS—*jurisdiction*—*probate order*.

A circuit judge sitting in probate has no jurisdiction over trusts as distinguished from estates. But an order of surcharge made by a circuit judge in a proceeding in probate upon the settlement of the final account of an executrix, who was also a trustee of certain property devised to her by the will, is not void for lack of jurisdiction on the part of the judge sitting in probate because in arriving at the balance with which the executrix was sur-

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charged the judge erroneously took into consideration certain receipts and disbursements made in the capacity of trustee, and as agent for other trustees.

Equity—bill of review—time for filing bill.

A bill of review based upon errors apparent on the record must ordinarily be brought within the time limited by statute for prosecuting an appeal or writ of error from the decree sought to be reviewed, except in case of the complainant's disability.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal, allowed by the circuit judge, from an interlocutory order denying a temporary injunction made and entered in the above entitled suit on June 24, 1915. The bill, upon the averments of which the injunction was asked for, showed that the complainant was a surety upon a bond given by one Jessie K. Kaae as executrix of the will of Margaret V. Carter, late of Honolulu, deceased; that upon an examination and settlement of the final accounts of said executrix an order had been entered by a circuit judge sitting in probate, on the 5th day of November, 1910, surcharging her and directing her to pay into court the sum of \$730.28 found to be due from the executrix to the estate; that no appeal was taken from said order; that neither the complainant nor his cosurety was notified of the hearing upon the accounts, nor was present thereat; that thereafter, the executrix having failed to comply with said order, an action was prosecuted upon the bond against said Jessie K. Kaae, principal, and J. F. Colburn and A. A. Long, sureties, and judgment was had against them; that exceptions taken to the supreme court by said Kaae and Long were overruled, and a writ of error obtained by the said Colburn was dismissed; and that an execution upon said judgment has been issued, and property of the complainant levied on. It was also averred in the bill that the circuit judge sitting in probate was without jurisdiction to enter the order of November 5, 1910, for the reasons that the sum surcharged against Mrs. Kaae as aforesaid repre-

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sented a debit balance after giving her credit for and charging her with all moneys respectively received and disbursed by her in her capacity of trustee of certain property devised to her in trust by said will and as agent for Junius Kaae and John C. Lane, trustees of certain other property devised to them in trust by said will, and not in her capacity as executrix; that all the matters and things, and items of money received and disbursed, upon which the order of surcharge was predicated were particularly within the jurisdiction of a circuit judge in equity and not within the jurisdiction of a circuit judge sitting in probate; and that it affirmatively appeared upon the proceedings upon which said order was predicated, and now appears, that Mrs. Kaae had no moneys in her hands belonging to the estate of Margaret V. Carter, deceased, but on the contrary, said estate is indebted to her as executrix for moneys expended by her upon the administration of the estate. The prayer of the bill was that the order of surcharge of November 5, 1910, be reviewed, set aside and held for naught; that the respondents be enjoined from enforcing the judgment obtained against the complainant in the action on the bond; for costs and general relief. The proceedings had in this court in connection with the action on the bond are reported in 22 Haw. 397 and 403.

On behalf of the complainant it is contended that the order of November 5, 1910, was void; that it ought to be reviewed and set aside; and that the enforcement of the judgment in the action on the bond should be restrained by injunction. We find it impossible to sustain these contentions.

The first point to be considered is whether the order of November 5, 1910, was void because of the lack of jurisdiction of the circuit judge, sitting in probate, to make it. Counsel for the complainant argues that as it was made to appear by the bill of complaint that in the proceeding in

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which the order of surcharge was made against the executrix, and in ascertaining the balance found to be due from the executrix to the estate, the circuit judge took into account certain receipts and disbursements of Mrs. Kaae in capacities other than that of executrix, namely, as a trustee and as agent for other trustees, the want of jurisdiction was shown and the invalidity of the order established, since circuit judges sitting in probate have no jurisdiction over trusts as distinguished from estates. Although, in this Territory, there are no "probate courts" or "chancery courts," as all original probate and equity jurisdiction is vested by law in "circuit judges at chambers," nevertheless there is a clear line of demarcation between the two jurisdictions, and it must be regarded as definitely settled that a circuit judge sitting in a proceeding essentially "probate" in character has no authority to appoint a trustee or to compel a trustee, as distinguished from an executor or administrator, to account. *Estate of Brash*, 15 Haw. 372, 377; *Long v. Holt*, 18 Haw. 290, 297; *Estate of Enos*, 18 Haw. 542, 547. It must be conceded, therefore, that the circuit judge, while sitting in probate in the matter of the estate of Margaret V. Carter, deceased, would have had no power to compel Jessie K. Kaae, in her capacity of a trustee under the will of certain property, or as the agent of other trustees of other property devised in trust to them, to file an account or to surcharge her with a debit balance if the proceeding had been one instituted for *such* purpose. But the averments contained in the complainant's bill show that the proceeding in which the order of surcharge of November 5, 1910, was made was not only one essentially "probate" in character, but was instituted for the purpose of hearing and settling the final account of Mrs. Kaae, which had been filed by her in her capacity as executrix of the will. The circuit judge, sitting in probate, had jurisdiction of the subject matter. If, in the settle-

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ment of the account of the executrix, a mistake was made, and in arriving at a supposed debit balance and surcharging the executrix therewith, the circuit judge had through some misapprehension of the facts confused other matters with those pertaining to the administration of the estate, the order of surcharge was erroneous, and liable to reversal if appealed from, but it was not on that account void. For present purposes the averments of the bill are taken as true, and it is assumed to be a fact that such an error did occur, but it is not true that the mistake had the effect of ousting the circuit judge of jurisdiction to make the order. Upon the theory that the order of surcharge, the failure of the executrix to comply with which gave rise to the action on the bond, was void, the complainant, clearly, is not entitled to an injunction against the enforcement of the judgment rendered against him in that action. The defense that the order was void was available in that action, but the contention does not appear to have been made at the trial. The enforcement of a judgment at law will not be restrained in equity because of the existence of a defense which was available in the action at law but which was not presented solely because of the choice or fault of the defendant. *Scott v. Pilipo*, 21 Haw. 766, 771; 4 Pom. Eq. Jur. (3rd. ed.) Sec. 1361. In any event the complainant cannot say he has not had his day in court as to that point. And the validity of the judgment in the action on the bond is not attacked.

Counsel for the complainant argues that the bill in this case may be maintained as one in the nature of a bill of review, and that as error in law apparent on the record was shown, the order of November 5, 1910, should be reviewed and set aside. Without considering other possible objections that might perhaps be raised in connection with this contention, we are of the opinion that the bill, as one of review, comes too late. The maximum time allowed

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by the statute for the filing of a writ of error is six months from the entry of the judgment or decree against which the writ is directed. "A bill of review based upon errors apparent must ordinarily be brought within the time limited by statute for prosecuting an appeal or writ of error from the decree sought to be reviewed, except in case of the complainant's disability. If it be filed within that time it is not, in the absence of special facts requiring speedier action, barred by laches." 2 Beach, Mod. Eq. Pr. Sec. 864. See also 3 Enc. Pl. & Pr. 583; *Cent. Trust. Co. v. Grant Locomotive Works*, 135 U. S. 207, 227; *Fraenkl v. Cerecedo*, 216 U. S. 295, 301; *Genz v. Genz*, 254 Ill. 161; *Kelsey v. Dilks*, 72 N. J. E., 834. In the case at bar it is not claimed that the complainant was under any disability, nor are there present any fraudulent circumstances or other exceptional facts which could possibly take the case from under the rule.

Mr. Justice Quarles being disqualified, the parties stipulated to submit the case to the remaining justices.

The order disallowing a temporary injunction is affirmed.

J. Lightfoot for complainant.

Lorrin Andrews (*W. J. Robinson* with him on the brief) for respondents.

Syllabus.

MARY KALEIALII, REBECCA LEHIA MILES AND ANNIE K. BOYD, AND ROBERT N. BOYD AND VICTOR K. BOYD, BY THEIR GUARDIAN AD LITEM, JOSEPHINE BOYD, v. HENRIETTA SULLIVAN, JOHN BUCKLEY AND HENRY HOLMES, TRUSTEE UNDER THE WILL OF JOHN J. SULLIVAN, HENRIETTA SULLIVAN, JOHN BUCKLEY, PRISCILLA ALBERTA SULLIVAN CLARKE, AND ROBERT KIRKWOOD CLARKE, A MINOR, JUANITA ELLEN CLARKE, A MINOR, AND THOMAS WALTERS CLARKE, A MINOR.

No. 879.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED OCTOBER 21, 1915.

DECIDED NOVEMBER 9, 1915.

WATSON AND QUARLES, JJ., AND CIRCUIT JUDGE ASHFORD, IN
PLACE OF ROBERTSON, C.J., DISQUALIFIED.

DEEDS—construction.

A deed to P and M, habendum to P and M and "their representatives, heirs and assigns forever," conveys to each of said grantees a fee simple in an undivided half of the land.

SAME—same—clearly expressed intention of parties given effect.

Where the granting clause and habendum in a deed decisively show the intention of the parties ambiguities and inconsistencies in other and subsequent clauses of the deed will not defeat such intention.

OPINION OF THE COURT BY WATSON, J.

This action, to quiet title to a parcel of land situate on Hotel street in Honolulu, was tried by the court, jury waived, and was submitted below on the pleadings and the evidence and briefs presented by the respective parties. It comes here on reserved questions which require the construction of a certain deed in the Hawaiian language,

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executed by Alexander Adams, Jr., to his two daughters, Peke and Maria. A translation of the material parts of the deed, as agreed to by the parties, is as follows:

"This deed is an absolute conveyance of land made this 15th day of September in the year of our Lord One Thousand Eight Hundred and Fifty-eight between Alexander Adams, Jr., of Honolulu, Island of Oahu, the party of the first part, and Peke and Maria, his daughters of the same place of the second part.

"WITNESSETH: That the above named Alexander Adams, Jr., of his own volition, in order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance. And whereas, the said Alexander Adams, Jr., because of his own desire for the aforesaid daughters that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands.

"Now therefore this deed showeth that the above mentioned Alexander Adams, Jr., in consideration of the statements herein made and of two dollars paid into his hands by the parties of the above mentioned second part which has been received in witness of the making, sale, giving, conveying, releasing, effectuating and confirming, therefore, by this deed, do make, sell, give, convey, release, effectuate and forever quit claim to the parties of the second part hereinabove mentioned all those certain pieces of land" (here follows a description of the land conveyed, including the parcel in question).

"To have together with the things thereupon the houses and appurtenances, rights and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things together with the interest and rights appertaining to the party of the first part (shall belong to Peke and Maria and to their repre-

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sentatives and heirs and assigns forever.

"And the above mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr., of the first part and to his heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner enjoyed by their parents.

"Provided that if one of the parties of the second part should die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them.

"The parties of the second part hereinabove set forth do hereby witness under oath and by affirmation as well to all the contents of this deed and do hereby bind and both consent to and with the party of the first part hereinabove mentioned to ratify and certify and to bond and execute to the truth of this deed as well as to all the conditions herein contained.

"In witness whereof I hereby sign with my hand and seal this day and the year first above written.

"Alexander Adams, Jr."

The following facts, *inter alia*, are reported by the presiding judge of the trial court:

"1. Alexander Adams, Jr., being then the owner of said land in fee simple, conveyed the same (with other lands) to his daughters Peke (known also as Peke Stone) and Maria (known also as Maria A. Boyd) by a deed dated September 15, 1858 * * *" (a translation of the same, agreed to by the parties to be a correct translation, being hereinabove set out).

"2. Said Peke thereafter executed and delivered to said Maria two deeds dated December 1, 1868, and October 21, 1885, respectively, in terms conveying her interest in said

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land to said Maria and her heirs forever. * * * Said Maria thereafter executed and delivered to G. H. Robertson and C. Bolte a deed dated October 26, 1885, in terms conveying to them and the survivor of them and their successors in trust all of said land, and said G. H. Robertson and C. Bolte thereafter executed and delivered a deed dated December 8, 1885, in terms conveying all of said land to John J. Sullivan and John Buckley and their heirs and assigns forever, who, and whose assigns, have ever since been and now are in possession of said land and have from time to time made valuable improvements thereon. Said John Buckley is one of the defendants herein and the other defendants are the successors in interest of said John J. Sullivan. Said Maria died in 1894, leaving children who still survive."

"3. Said Peke died on July 5, 1914, leaving surviving her only two children, namely, Mary Kaleialii, born on October 20, 1859, one of the plaintiffs herein, and Robert N. Boyd, born on September 2, 1863, who died on September 9, 1914, leaving surviving him four children, namely, Rebecca Lehia Miles, Annie K. Boyd, Robert N. Boyd and Victor K. Boyd, the other plaintiffs herein. * * *"

The plaintiffs claim that the deed from Alexander Adams, Jr., to his daughters Peke and Maria, gave only a life interest in one-half of the land to each of the grantees with remainder in fee simple to their respective children, and that on the death of Peke on July 5, 1914, her life estate ended and a remainder in fee simple in her half of the land took effect in possession in her two surviving children, namely, Mary Kaleialii (one of the plaintiffs) and Robert N. Boyd, who was the only other original plaintiff, but upon whose death, September, 9, 1914, his children were substituted in his place as co-plaintiffs with Mary Kaleialii. The defendants claim that the deed to Peke and Maria gave them each a fee simple in half of the land and that Peke's interest passed to Maria by her two deeds of 1868 and 1885, and that the fee simple in both halves, or the whole of the land, passed by subsequent deeds from

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Maria through Robertson and Bolte to the defendants, who have been in undisturbed possession, claiming under said deeds a fee simple title to the whole of the land, and spent large sums in improvements thereon, for the last thirty years.

Counsel for plaintiffs invoke the rule that deeds should be construed in accordance with the intention of the parties to them and argue that it is apparent from a reading of the entire instrument that the deed from Alexander Adams to his daughters, Peke and Maria, was intended to convey but a life interest to the grantees named therein with remainder over to their children, respectively. In support of this position counsel rely most strongly upon those portions of the deed contained in the premises: "In order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance;" "that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs;" and the portion of the deed immediately following the habendum clause as follows: "And the above mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty, but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr., of the first part and to his heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner enjoyed by their

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parents. Provided that if one of the parties of the second part should die without issue living at the time, all the rights above mentioned shall descend to the survivor of them."

We cannot adopt the position of counsel. According full recognition to the rule that deeds should be construed in accordance with the intention of the parties to them, that must be taken as qualified by the other rule that such intention must be ascertained from the language of the instrument itself. *Mercer v. Kirkpatrick*, 22 Haw. 644; *Green Bay & Miss. Canal Co. v. Hewett*, 42 Am. Rep. 701, 702. In *Ackerman v. Vreeland*, 14 N. J. Eq. 23, 28, the court, in construing a deed, said:

"It was a common law conveyance, and like all similar muniments of title, is to be construed according to its terms, and not according to the real or supposed intention of the parties."

"The question * * * is, not what was the intention of the parties, but what is the meaning of the words they have used." Lord Denman in *Rickman v. Carstairs*, 5 B. & Ad. 651, 663.

It will be seen from the deed that the grantor, Alexander Adams, Jr., after first designating the deed "an absolute conveyance of land" (the term "absolute" is defined by Rapalje & Lawrence in their Law Dictionary as meaning "complete, final, perfect, unconditional, unrestricted"), conveyed to his daughters, Peke and Maria, the land in contest, using the words, "do make, sell, give, convey, release, effectuate and forever quit claim to the parties of the second part * * * all those certain pieces of land" (here follows a description of the land, including the parcel in question); "To have together with all the things thereupon the houses and appurtenances, rights and privileges as well as the proceeds thereof, either in law or equity, to receive from said lands and from all sources and all things

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together with the interest and rights appertaining to the party of the first part (shall belong to Peke and Maria and to their representatives and to their heirs and assigns forever)." In this case both the granting and the habendum clauses of the deed convey the fee forever.

While it is true that there are no words of inheritance in the granting clause, the deed was executed in 1858 prior to the enactment of the statute which adopted the common law and the word "heirs" was not essential to convey a fee simple. *Branca v. Makuakane*, 13 Haw. 499. Even were this not the law in this jurisdiction, the habendum being to the grantees and their heirs and assigns, and there being no inconsistency between the granting clause and the habendum, the latter would control in the matter of fixing the estate of the grantees as one in fee.

"Where no estate is mentioned in the granting clause, then the *habendum* becomes efficient to declare the intention, and will rebut any implication which would otherwise arise from the omission in this respect in the preceding clause." *Riggin et al. v. Love et al.*, 72 Ill. 553.

Giving to the expressions found in the deed and relied on by plaintiffs all of the force to which they are entitled, the most that can be said of them is that they are ambiguous, and, if given the meaning contended for by plaintiffs, inconsistent with the clearly expressed intent of the parties as found in the granting clause and the habendum.

As to the language found in the premises of the deed, which is relied on by plaintiffs as showing that the estate conveyed to the daughters was one for life only, we are of the opinion that such language, if given its proper interpretation, is equally if not more consistent with a fee simple than with a life estate.

Touching the language found in the deed immediately following the habendum, should it be conceded that such

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language indicates the intention of the parties that the grantees should take a life estate only, with remainder over, we are of the opinion that the attempt to so limit the absolute grant is null and void because utterly inconsistent with both the granting and the habendum clauses of the conveyance. *Simerson v. Simerson*, 20 Haw. 57; *Nahaolelua v. Heen*, 20 Haw. 372, 377; *Ray v. Spears' Ex'r.*, 64 S. W. 413.

"If the deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses of the deed will not defeat such intention." 2 Devlin on Deeds, Sec. 837.

"In *Cholmondeley v. Clinton*, 2 Jac. & W. 84, which was a case most elaborately argued and considered, it was said by the court that, where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected from other parts of the same deed. To support this rule of construction, the court cites and comments upon the following cases: *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321; *Ackerman v. Vreeland*, 14 N. J. Eq. 23; *Wilder v. Davenport*, 58 Vt. 642, 5 Atl. 753; *Cutler v. Tufts*, 3 Pick. 272; *Wilcoxson v. Sprague*, 51 Cal. 640; *Green Bay & M. Canal Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382." *Carl-Lee v. Ellsberry*, 82 Ark. 209, 101 S. W. 407, 12 L. R. A. N. S. 956, 958.

The fact that the grantor invested the grantees (his daughters) with power to "leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty" is strongly indicative, if not conclusive, of the intent of the parties that the grantees were to take the fee. *Ray v. Spears' Ex'r.*, *supra*.

"So, though a devise to a wife for life, and after her decease, she to give the same to whom she will, passes but an estate for life with a power; yet, if an express estate for life had not been devised to the wife, an estate in fee would have passed by the other words. 8 Vin. Abr. Devise, 4 W. a., pl. 4, p. 234." *Burwell's Ex'ors v. Anderson, Adm'r.*, 3 Leigh (Va.) 348, 356.

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"A life estate is usually created by words of express limitation, and will not be assumed unless there are such words or their equivalent. If the deed shows by other provisions that the grantor intended his grantee to hold an estate for life only, such would be its effect. But if there be inconsistent provisions, some indicating a power of absolute disposal, which can only be had by the holder of the fee, and others creating a remainder which supposes a life estate, then the words of the *habendum* have a controlling significance." *Green et al. v. Sutton et al.*, 50 Mo. 186, 192.

We are of the opinion that the deed from Alexander Adams, Jr., to his daughters, Peke and Maria, gave them each a fee simple in an undivided half of the land.

F. Andrade (*Lorrin Andrews* with him on the brief) for plaintiffs.

W. F. Frear and *C. H. Olson* (*Frear, Prosser, Anderson & Marx* and *Holmes & Olson* on the brief) for defendants.

IN RE TAXES HAWI MILL & PLANTATION CO.,
LTD.

IN RE TAXES UNION MILL CO.

Nos. 886 and 885.

APPEALS FROM TAX APPEAL COURT, THIRD CIRCUIT.

SUBMITTED NOVEMBER 10, 1915.

DECIDED NOVEMBER 19, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

TAXATION—*enterprise for profit—net profits—depreciation.*

In ascertaining the net profits of an enterprise for profit under R. L. 1915, Sec. 1241, moneys laid out in necessary improvements, as well as the bare running expenses, are to be deducted, but a

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further sum for estimated depreciation of plant is not deductible.
SAME—factors to be considered.

The earning power of an enterprise for profit is a potent factor, but not the only factor, to be considered in assessing an enterprise for profit. The value of the separate items of property making up the whole is to be taken into consideration.

OPINION OF THE COURT BY ROBERTSON, C.J.

These are appeals from the tax appeal court of the third judicial circuit making assessments as of January 1, 1915, the appellant in each case being the tax payer.

Hawi Mill & Plantation Co., Ltd. In this case the company returned the aggregate value of its combined property as the basis of an enterprise for profit at \$550,000. The assessor assessed it at \$1,000,000, and the tax appeal court fixed the valuation at \$900,000. The matter of the assessment of this company's plantation was before this court upon its 1912 assessment, and a valuation of \$1,100,000 was then given it. *Hawi M. & P. Co. v. Forrest*, 21 Haw. 389. The company holds its lands partly in fee simple and partly under lease. About one-half of its cane area is artificially irrigated. Counsel for the appellant urges that the full cash value of the property was materially less on January 1, 1915, than it was three years previously and argues that the value of the plantation, as shown by the evidence, does not exceed \$650,000.

As to the valuation of the separate items of property going to make up the whole, the record shows the estimate made by the deputy assessor, \$926,403, as against that of the company, \$547,653.97, without any express finding on the point by the tax appeal court. Probably the decision appealed from was based largely upon the data which was submitted on behalf of the company showing its receipts, expenses and profits for seven years, coupled with such testimony as was offered showing changes in conditions since 1912, and the testimony of the assessor show-

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ing his endeavor to fix the assessment in the case of this plantation consistently with the method followed with reference to the assessment of sugar producing properties in general. The stock of this company is not quoted in the market. The evidence shows that since the prior decision referred to a government lease of 583 acres has been terminated with a view to homesteading the land; that the rainfall during the years 1912 and 1913 was below the average; that the crops of 1913 and 1914 averaged 6706 tons as against an average for 1909-1911 of 7097 tons; and that the crop for 1912 which, at the time of the prior decision, was estimated at 7211 tons, actually yielded 8237 tons. The present crop is estimated at 6900 tons. It was further made to appear that the figures as to the net profits which were submitted to the court in the last case were erroneous in that they included certain income derived from other sources than the plantation. The opinion on the former appeal shows, however, that the uncertainty of rainfall and its effect upon the crops, and the probability that some of the land held by the company of the government would be withdrawn, were taken into consideration. Indeed, the court then considered all the circumstances, those which made against the future prospects of this plantation as well as those which tended to a favorable outlook. And the reduction of the assessment in that case to \$1,100,000, which, upon the capitalization of profits basis, was at the very liberal rate of about 18 per cent., was made upon the ground that the probabilities, so far as they could be judged for the future, were against the very favorable results of previous years. The evidence shows that the profits of this plantation for the seven years last past (1908-1914) have averaged \$132,297, which, upon an assessment of \$900,000, on the basis of the capitalization of profits, is at the rate of a little less than 15 per cent.—a more normal rate than that allowed

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in the prior appeal. In ascertaining the sum available for the payment of dividends amounts laid out in necessary improvements as well as the bare running expenses must be deducted, but in showing the actual profits a further sum for estimated depreciation of plant is not deductible under section 1241 of the Revised Laws. The further argument of counsel for the appellant refers to the fact that since the last appeal was decided legislation has reduced the duty on raw sugar and provided for its abolition on May 1, 1916. This is a matter which affects the sugar properties throughout the Territory, but just what result the admission of sugar duty free will have upon the taxable value of sugar plantations can better be determined after the happening of the event. *In re Taxes Ewa Plantation Co.*, 16 Haw. 555, 559. In the meantime the rise in the market price of sugar following the outbreak of the war in Europe returns large profits to these companies. The market quotation of raw sugar on January 1, 1915, was a trifle over four cents per pound with favorable prospects for the continuance of profitable prices for some time to come.

We hold that the assessment as fixed by the tax appeal court should not be disturbed. It is affirmed.

Union Mill Company. In this case the corporation returned the aggregate value of its plantation property as the basis of an enterprise for profit at \$200,000. The assessor assessed it at \$300,000, and the assessment was sustained by the tax appeal court.

This plantation adjoins that of the Hawi Mill & Plantation Co. in the district of North Kohala, and is subject to the same climatic conditions. Like the other plantation it is partly irrigated, and obtains its water supply from the same source, the Kohala ditch. Its cane lands comprise an area of about 1453 acres owned in fee simple, and 874 acres held under lease. It also has about 533 acres of pasture

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land owned in fee. Its output for the past six years has averaged 2853 tons of sugar. The estimate for the present year is 3500 tons. Its profits for the past seven years (1908-1914) have averaged \$35,343, though it sustained a loss in 1913 and has paid no dividend since 1912. Upon a consideration of the profits alone and capitalized at the same rate as that applied in the case of the Hawi plantation, the assessment at \$300,000 could not be sustained. This was conceded by the assessor in his testimony before the court below, but in placing the assessment at that figure he properly took into consideration the valuation placed upon the separate items of property which comprise the whole plantation by the deputy assessor and by the company itself. In assessing an enterprise for profit under section 1241 of the Revised Laws the earning power of the concern "is one of the most potent factors" to be considered. *Tax Assessment Appeals*, 11 Haw. 235, 238. But it is not the only factor to be taken into consideration. *In re Taxes, H. F. Wichman & Co.*, 16 Haw. 793, 795; *In re Taxes, Gay & Robinson*, 17 Haw. 227. The detailed valuation by the company of its separate items of property aggregated \$293,535, and a witness testifying for the company increased it by \$10,000. The deputy assessor appraised the separate items at the aggregate of \$412,000. The tax appeal court made no express finding on the point, though it is evident that this evidence entered into its decision sustaining the assessment. The valuation is sustained by the evidence adduced by the appellant. The value of the whole would not be less than the sum of its parts, unless, what is not shown here, the value of the parts was depreciated by reason of their combination.

We are of the opinion that the decision appealed from should be affirmed, and it is so ordered.

W. L. Stanley for the tax payers.

A. A. Wilder for the assessor.

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LINCOLN L. McCANDLESS *v.* CARL DU ROI.

No. 878.

APPEAL FROM LAND COURT.

HON. W. L. WHITNEY, JUDGE.

ARGUED OCTOBER 28, 1915.

DECIDED NOVEMBER 26, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

RECORDS—*decree of land court—construction—description of land.*

A surveyed description of land contained in a decree of the land court, if it requires construction, is subject to the same rules of construction as a description contained in an instrument *inter partes*.

BOUNDARIES—*questions of law and of fact.*

What is the boundary between certain lands is a question of law, but the location of that boundary upon the ground is a matter of fact.

SAME—*construction of description.*

The general rule that course and distance will yield to known visible and definite objects whether natural or artificial will be applied when the description explicitly states that the object is the boundary.

SAME—*meander lines.*

Where a decree of the land court determined the boundary of land to be the bank of an auwai, the bank must be regarded as the true boundary, and not the meander points or lines which describe the sinuosities of the auwai.

APPEAL AND ERROR—*appeal from decree of land court.*

Under Sec. 3145, R. L. 1915, an appeal from a decree of the land court may be taken to the supreme court upon points of law only.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Quarles, J., dissenting.)

The petitioner (appellant) and the contestant each owns a parcel of land situate on Liliha street in Honolulu. Their

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lands adjoin on one side. In 1904, the land court, upon the petition of the present contestant, Du Roi, entered a decree confirming his title to his lot and brought the same under the operation of the land registration act (R. L. 1915, Ch. 178). In that decree the boundary between the lands of these parties was described as follows:

"5. 276° 10' 56.1 feet along land described in L. C. Award 1127, Ap. 2, the south bank of the auwai being the boundary.

"6. 295° 15' 35.6 feet along the south bank of the auwai.

"7. 265° 56' 54.2 feet along the south bank of the auwai."

The initial point of the boundary thus described being the north-west corner of the contestant's lot. It is conceded that that decree conclusively determined the boundary between the two lands. That determination, clearly expressed in the decree, was that the boundary ran "along the south bank of the auwai." This was assumed by court and counsel to mean the edge of the bank. The petitioner, McCandless, in describing this boundary in his petition in the case at bar, followed the former decree except that, with a view to more definitely locate the edge of the south bank of the auwai, added certain offsets from straight lines run between the located points mentioned in that decree to the exact edge of the bank. That gave rise to this controversy as it developed a dispute as to the exact location of the auwai upon the ground at the time the former decree was made. It presented a question of fact which, upon conflicting evidence, was decided against the petitioner's contention. The land court held that the south bank of the auwai was in the same location in 1904 as at the time of the trial of this case; that the located points in the former decree were not exactly coincident with the edge of the auwai; and that in endeavoring to locate the edge of the auwai in the decree in this case it would be necessary to give offsets

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at the located points as well as at the intermediate points as asked for in the petition. The contest, therefore, involves a narrow strip of land lying between what the petitioner contends was the line of the edge of the auwai at the time of the former decree, and its present makai edge, the contestant contending that the position of the bank has not been changed. The width of this strip varies from practically nothing to 1.7 feet. What is the boundary between certain lands is a question of law, but the location of that boundary upon the ground is a matter of fact. 5 Cyc. 969. *Smith v. Smith*, 110 Mass. 302, 304; *Whitehead v. Ragan*, 106 Mo. 231, 236; *Taylor v. Fomby*, 22 So. (Ala.) 910, 912; *Mitchell v. Williams*, 76 S. E. (Va.) 949. Here there can be no dispute as to the question of law, for, as above stated, the decree of 1904, in explicit terms, determined the "south bank of the auwai" to be the boundary. The disputed question of fact, namely, the location of the bank of the auwai, has been conclusively settled by the finding of the court below. The ground upon which the petitioner asks for a reversal of the decree in this case is, that in specifying offsets to define the exact edge of the auwai at the points located in the former decree, the present decree is inconsistent with, and, in effect, changes the former adjudication. There is no merit in the contention. The matter of locating the exact edge of the auwai by means of offsets was brought into the case by the description contained in the petition, and as the evidence disclosed the fact that the located points in the 1904 decree were not coincident with the edge of the auwai it became necessary in the decree in this case to specify those offsets. Under the decree in this case the boundary remains exactly where it was determined to be by the former decree, namely, "along the south bank of the auwai" as it then existed. The new decree, at the instigation of the petitioner himself, simply undertook to definitely locate the edge of the auwai

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at certain points. The petitioner's grievance really is that the question of fact as to whether the location of the south bank of the auwai has been changed since 1904 was decided against him. But that question is not open for review upon this appeal. The statute allows appeals to be taken from decrees of the land court upon the facts to the circuit court and a jury, and allows appeals to be brought to this court "solely upon points of law." R. L. 1915, Sec. 3145.

A surveyed description of land contained in a decree of court, if it requires construction, is subject to the same rules of construction as a description contained in a patent, a deed, or other instrument *inter partes*. If the former decree be regarded as assuming that the four located points were at the edge of the auwai, and the fact be, as from the finding made by the land court we must take it to be, that the points specified in the boundary described in the former decree were in fact not coincident with the south edge of the auwai, then an ambiguity was shown which called for construction. In that event the rule would apply that "course and distance will yield to known visible and definite objects whether natural or artificial." 5 Cyc. 913, 921. This is unavoidable where, as here, it is clearly stated that the object, to wit, the bank of the auwai, is the boundary. In the case at bar an admitted ambiguity arises in the description of the point contained in the former decree with reference to the north-west corner of the Du Roi land. That corner is located in the decree in three ways, by course and distance and by reference to two objects, viz.: "190° 25', 86.5 feet along L. C. Award 1127 * * * to east angle of wall at auwai." The undisputed evidence in this case showed that no two of those references were coincident. The point located by course and distance is a short distance north of the angle of the wall, and the edge or bank of the auwai is a short distance north of the located point. The double ambiguity in regard to that point must be resolved,

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as the single ambiguity as to the other points is to be resolved, by giving controlling effect to the explicit statement in the decree that the bank of the auwai is the boundary. The decree in the present case, following the description in the petition, avoids one of the ambiguities of the former decree by omitting the reference to the angle of the wall. That was perfectly proper, and by so doing the former decree was no more impeached than it is by adhering to the bank of the auwai at the other places at which the court found the points located by course and distance were in fact not coincident with the bank. "Location of land is a question of evidence and cannot be reduced to fixed and definite rules. A correct location consists in the application of any one or all of the rules of construction to the particular case; and when they lead to contrary results, that must be adopted which is most consistent with the intention apparent on the face of the grant or conveyance, to give effect to which the agreed on line therein described may be corrected so as to correspond with the fact." 5 Cyc. 883. The former decree was impotent to change the physical facts as they existed on the ground. Upon this view of the case the court below properly held that the points located by course and distance being not coincident with the bank of the auwai must yield to the bank, which, in the present decree, was particularly located by means of offsets.

The same result is reached by approaching the matter from another—and, we think, a more accurate—standpoint. The south bank of the auwai being irregular, the located points given in the former decree are to be taken as meander points merely and are not to be regarded as points on the exact boundary. Counsel for the appellant admits, as he must, that the bank of the auwai is the boundary *between* those points, and it logically and neces-

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sarily follows that at those points also the bank is the boundary whether it be coincident with the located points or not. In other words, the straight lines from point to point, as shown on the plan attached to the description in the former case, were not intended to be, and are not claimed to be, boundary lines. They were mere meander lines. "In surveying land adjacent to a stream, whether navigable or not, lines are often run from one point to another along or near the bank or margin of the stream. * * * These are called meander lines, and they are not the boundaries of the tract, but they merely define the sinuosities of the stream which constitutes the boundary, and as a general rule, the mentioning in a deed or grant, of a meander line on the bank of a river as a boundary, will convey title as far as the shore unless a contrary intention is clearly apparent." 4 R. C. L. p. 97. See also 5 Cyc. 899; *Whitaker v. McBride*, 197 U. S. 510, 512; *Freeman v. Bellegarde*, 108 Cal. 179, 185; *Stonestreet v. Jacobs*, 118 Ky. 745, 749; *Tucker v. Mortenson*, 126 Minn. 214. In *Mitchell v. Smale*, 140 U. S. 406, 414, the supreme court said, "It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary." And in 2 Devlin on Deeds (2nd ed.), Sec. 1026A, the author says, "The principle is so well established that it would serve no good purpose to elaborate it." A proper understanding of the object of the located points in the former decree shows that there is no real conflict in the description contained in the decree as between the bank of the auwai and the located points, and that the bank is the boundary throughout.

There being no error of law in the decree appealed from, it is affirmed.

P. L. Weaver for petitioner.

R. B. Anderson (*Frear, Prosser, Anderson & Marx* on the brief) for contestant.

Quarles, J., dissenting.

DISSENTING OPINION OF QUARLES, J.

Unable to concur in the majority opinion, although agreeing with much that is there said, it is my duty to set forth my reasons for dissenting. Not only did the land court and counsel for the respective parties treat the south bank of the auwai or ditch as the edge or point from which the ground begins to slope or fall to the water, but the evidence, without contradiction, shows the edge, as above defined, to be the bank of the auwai. The location of points 4, 5 and 6 in the boundary lines between the parties in the decree registering the boundary of the respondent Du Roi, made in 1904, fixes them at the south bank of the auwai and intermediate between said points as along the south bank of the auwai. The survey of the petitioner accompanying his petition shows that these points are not now at the edge of the south bank of the auwai but vary therefrom from six-tenths of a foot to 1.6 feet. The decree of 1904 is admitted to be *res adjudicata* and binding upon the parties. To my mind it irrevocably fixes the points in dispute as at the edge of the south bank by course and distance tied to two government survey stations, viz., Punchbowl and Rose Bank stations, by course and distance, so that should the auwai be completely obliterated and the monuments marking said points destroyed or removed the said fixed points could always be correctly and definitely located at their several points of location as fixed in the decree of 1904. The description in said decree of 1904 as along the south bank of the auwai means as it then existed. The effect of the decree of the land court in the present case, which the majority opinion affirms, is to move the boundaries between the parties from the places where located in the decree of 1904 in varying distances. This, to my view, disturbs the decree of 1904, unsettles it to a certain extent, contrary to the rule of law that said decree is binding on the parties to it and privies thereto.

Quarles, J., dissenting.

If by decree, now made, the boundary line between the parties can be moved one foot, then it may by a later decree be moved ten or more feet, and the idea of permanency of title and boundary,—the basic principle upon which our land registration system, following the Torrens system, is founded,—is a delusion and a snare. The said points in dispute, being capable of exact location by course and distance at all times from the initial point of the respective surveys of the lands of the parties, should be by the language used in the decree of 1904 considered as fixed on the bank or edge of the auwai as it then (1904) existed. The auwai was erroneously treated by the land court in this case as a natural object, and that court held that the location of points 4, 5, 6 and 7, as shown by present survey, must give way to the call for the south bank of the auwai as given in the former decree. In that ruling the court, in my opinion, erred. The inherent error in the decree now appealed from is that it has, by evidence that is conflicting, overturned facts settled and adjudicated by the former decree, namely, that the said disputed points were at the date of that decree on or at the edge of the south bank of the auwai. As before suggested, if these points may be moved by movement of the ditch, either by process of erosion or of avulsion or by the hand of man, then they may be moved any number of feet, and, under the theory of the decree here reviewed, and of the majority opinion, the petitioner might in course of time lose all of his land. Such is not, in my humble opinion, the law, and the error being one of law, and not of fact, this court is not powerless to remedy such error, but ought to do so. The majority opinion is correct wherein it states that "what is the boundary between certain lands is a question of law, but the location of that boundary upon the land is a matter of fact." But the fact, in my view, was settled in the decree of 1904, and is now unsettled and changed in

Quarles, J., dissenting.

the case at bar by the decree of the land court affirmed by the majority opinion. The boundary itself being a matter of law and its exact location upon the ground having been fixed and settled by the decree of a court having full jurisdiction, then, as matter of law, the location upon the ground of the boundaries is settled beyond controversy.

Ditches, roads, fences, marked lines on the ground and other work of man are not natural, but are artificial, objects which are not controlling when called for in surveys, deeds or other instruments, against courses and distances absolutely fixed by being tied to permanent objects such as the said government survey stations established for such purposes. The designation between natural objects and artificial ones is well stated in 4 R. C. L., at page 100, as follows: "Natural objects include mountains, lakes, rivers, creeks and rocks; while artificial objects and monuments consist of marked lines, stakes, roads and similar matters marked or placed on the ground by the hand of man." The boundaries, so far as they are in dispute, were settled in the decree of 1904 and cannot now legally be varied by changes in the ditch either by artificial or natural means. This is the rule in regard to natural streams. Where either the channel or bank of a natural stream is designated as the boundary of a tract of land any sudden, violent or visible change of the stream does not affect the boundary and it remains where it was. (*Collins v. State*, 3 Tex. App. 323; *Bouvier v. Stricklett*, 40 Neb. 792; *Degman v. Elliott* (Ky.), 8 S. W. 10; *Macdonald v. Morrill*, 154 Mass. 270; *Lynch v. Allen*, 20 N. C. 160; *St. Louis v. Rutz*, 138 U. S. 226; *Nebraska v. Iowa*, 143 U. S. 359). Such being the established rule with reference to visible changes in a natural stream, there is much more reason for applying the principle upon which the rule is based to a case where an artificial stream (a small ditch like the one in question here) has been changed by any means.

Points 4, 5, 6 and 7 are fixed points in the boundary

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lines between the parties, and this is adjudicated by the decree of 1904. The boundary between those points designated, being the south bank of the auwai, more or less curved, easily changed by accident or design, should not control courses and distances by which the given fixed points were established in the decree of 1904. This ruling is in harmony with that followed in the case of *White v. Luning*, 93 U. S. 514, 525, where a fence was designated as a portion of a boundary but was ignored and a call for course and distance followed.

What is said in the majority opinion with reference to surveys of meanders of streams and rights of riparian owners upon streams and the citation of authority upon those points have no application here, in my opinion, but establish rules governing where natural streams, principally navigable lakes and rivers, such as Lake Michigan and the Platte River, constitute boundaries of a given tract of land. I cannot conceive that the meanders of a small artificial ditch, like that in question here, when fixed points along it are given as the beginning and ending of certain boundary lines of a tract of land bordering such ditch fixed by solemn decree, should now be ignored as is done in the majority opinion, and the south bank of the small ditch regarded as the boundary line, regardless of the fixed given points. In doing so the land court followed a rule adopted in regard to the public surveys of the United States lands bordering on natural streams and where the owners of such tracts own to the middle of the channel, consequently with a small tract of land they get an island out in the stream much larger in extent than the small tract of land acquired from the government. The survey in the present case shows that the fixed points in the decree of 1904, instead of being at the south edge or bank of the auwai, as they were in 1904, are now from one inch to 1.7 feet south of the south bank of the auwai as it now exists.

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This shows conclusively, to my mind, a change or movement of the south bank of the auwai, but by such change or movement the respondent should not be held to acquire more land than was adjudged to him in 1904, and the petitioner, as successor to Pahu, should not be adjudged to have lost anything that he then had.

In my opinion the decree appealed from should be reversed and the land court should be directed to treat points 4, 5, 6 and 7 as fixed points in the boundary line between the petitioner and respondent, and with directions to establish the boundaries intermediate the said points as they existed at the date of the decree of 1904.

A. F. CASSELS *v.* CHARLES T. WILDER, TAX ASSESSOR AND COLLECTOR OF THE FIRST TAXATION DIVISION OF THE TERRITORY OF HAWAII.

No. 889.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED NOVEMBER 30, 1915.

DECIDED DECEMBER 3, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

TAXATION—*property on military reservation.*

Property on a United States military reservation owned by individuals is subject to taxation by the Territory.

OPINION OF THE COURT BY QUARLES, J.

The petitioner, an officer in the United States army, located at Schofield barracks in the city and county of

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Honolulu, and in the first taxation district, filed his petition in the circuit court of the first circuit to obtain an injunction enjoining the respondent, as tax assessor and collector, from collecting or attempting to collect a tax assessed against an automobile owned by the petitioner, and which, as alleged in the petition, was upon the United States military reservation, upon which said barracks are located, during the whole of the day of January 1, 1915. To the bill the respondent filed a demurrer upon the ground that the facts stated in the bill of complaint do not entitle the petitioner to the relief prayed, nor to any relief, in that, in addition to other reasons, it does not appear from the allegations of said bill of complaint that the said automobile is exempt from taxation by the Territory of Hawaii. The circuit judge, being in doubt as to the question of law raised by the demurrer, has reserved to this court the question, "Shall the demurrer be sustained on the grounds submitted?"

The only question is, whether or not the automobile in question is exempt from taxation by reason of its being upon a military reservation. It is questionable whether a court of equity may exercise jurisdiction in a case of this kind inasmuch as the petitioner might pay, under protest, the tax claimed to be illegal and bring an action at law to recover the amount so paid. But no question of jurisdiction has been raised by either party, and both parties being anxious to have the legal question involved determined, and the public interest requiring a speedy determination of the question, we have concluded to decide the question upon its merits. It has been held in this jurisdiction that, under some circumstances, a matter cognizable at law, if submitted by both parties, without objection, to a court of equity and there decided, is binding, the parties being held to have waived the question of jurisdiction (*Kuala v. Kuapahi*, 15 Haw. 300; *Hapai v. Brown*, 21 Haw. 756; 762-3). It has also been held, in a suit in equity, that a

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statute imposing an income tax was unconstitutional (*Campbell v. Shaw*, 11 Haw. 112. See also *Robertson v. Pratt*, 13 Haw. 590).

It is contended on behalf of the petitioner that the federal government having exclusive control of the said military reservation that persons and property thereon are not within the jurisdiction of the Territory for the purposes of taxation. The same question has arisen in a number of cases, while in other cases questions of jurisdiction of a kindred nature have been raised in both civil and criminal cases. In *Territory v. Carter*, 19 Haw. 198, it was held that the territorial courts have jurisdiction of misdemeanors committed on lands reserved by the United States for naval purposes, citing in support of the rule *Territory v. Burgess*, 8 Mont. 57 and *Reynolds v. People*, 1 Colo. 179. The same rule was announced in *United States v. Bateman*, 34 Fed. 86, where the defendant was charged with an offense committed on the Presidio military reservation in California. Early Wyoming cases sustain the contention of the petitioner, but these decisions have been overruled by the Wyoming court. In *Noble v. Amoretti*, 11 Wyo. 230, it was held that an Indian trader, licensed by the government to trade with the Indians on an Indian reservation subject to the jurisdiction of the federal government, is subject to the jurisdiction of the State, and his property situated on the reservation subject to taxation. In *Thomas v. Gay*, 169 U. S. 264, it was held that the legislature of Oklahoma Territory had jurisdiction to provide for the taxation of property of persons other than Indians situated on Indian reservations, and that such statute does not conflict with the provisions of the federal constitution. This decision was approved and followed in *Wagoner v. Evans*, 170 U. S. 588, in *Foster v. Pryor*, 189 U. S. 325, and in *Catholic Missions v. Missoula County*, 200 U. S. 118, 129. See also *Gay v. Thomas*, 5 Okla. 1, and the same case 7 Okla. 184. The supreme court

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of Arizona held in *Territory v. Delinquent Tax List*, 3 Ariz. 302, that private property of persons other than Indians upon an Indian reservation is subject to taxation, although that of Indians is not.

Lands within Indian reservations are within the exclusive jurisdiction of the federal government, and persons other than Indians cannot use such lands or lease them without permission from the federal government, yet it has been held that the civil authorities of a State or Territory may execute process upon persons other than Indians on such reservations, unless there is some treaty provision excluding the jurisdiction of the State or Territory within which such reservations are located. See *Langford v. Monteith*, 102 U. S. 145; *Utah & N. R. Co. v. Fisher*, 116 U. S. 28, and a number of later cases. The solicitor general, in an elaborate and interesting opinion, approved by the attorney general, reported in *Opinions of Attorneys-General*, Vol. 26, pp. 91-99, has followed the rules heretofore mentioned and held that property upon the Subig Bay naval reservation was not exclusively within the jurisdiction of the navy department of the United States and is subject to taxation by the civil authorities.

The Organic Act, Sec. 55, grants to the Territory the power to legislate upon all rightful subjects of legislation, including that relating to taxation of person and property. Section 1236, R. L., provides for the annual taxation of all real and personal property within each taxation district. The military reservation, upon which Schofield barracks are located, is within the first taxation district, of which the respondent is assessor and collector. We have no territorial statute, and Congress has passed none, to which our attention has been called, exempting automobiles or other private property on military reservations from taxation. Congress undoubtedly has the power to enact a statute exempting automobiles owned by persons in the army from taxation, when kept upon a military reservation in a Terri-

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tory, but it has not done so. In the absence of legislation, federal or territorial, exempting the automobile in question from taxation by the Territory of Hawaii, we hold that it is subject to taxation under the statutes of the Territory.

It follows from what has been said that the bill of complaint does not state facts entitling the petitioner to the relief asked, and therefore the question reserved is answered in the affirmative.

P. R. Bartlett (Holmes & Olson and M. A. Palen on the brief) for petitioner.

I. M. Stainback, Attorney General, for the assessor.

MANUEL SILVA NOVITE v. HAM PONG, TRUSTEE,
AND AH SING.

No. 882.

MOTION TO DISMISS WRIT OF ERROR.

ARGUED OCTOBER 13, 1915.

DECIDED DECEMBER 6, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*dismissal of writ.*

In an action for summary possession, where defendants bring error to review the judgment of a circuit court in plaintiff's favor, the writ will be dismissed on motion where it is made to appear that the judgment and execution thereon have been fully satisfied before the suing out of the writ.

LANDLORD AND TENANT—*summary possession—execution.*

Judgment in plaintiff's favor having been entered by a circuit court in an action for summary possession execution thereunder, namely, a writ of possession, may issue at any time thereafter unless stayed as provided by law.

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SAME—same—jurisdiction.

In this case held, that a plea to the jurisdiction of the court which purports to, but does not in fact, allege that the title to real estate is involved, was properly overruled.

OPINION OF THE COURT BY WATSON, J.

(Quarles, J., dissenting.)

The defendant in error (plaintiff below) moves to dismiss the writ of error sued out by the defendants on the ground that the judgment and execution thereon are fully satisfied. The petition for the writ was filed and the writ issued on September 28, 1915. The action was one for summary possession originally brought in the circuit court of Wailuku, Maui. The declaration in the district court is as follows:

“That heretofore, to wit, on the 4th day of November, 1913, the plaintiff herein did demise, let and lease unto Ham Pong and Kong Kee, all of those certain premises situate on Market street, in Wailuku, County of Maui, Territory of Hawaii, being the same premises conveyed to the said Manuel Silva Novite by W. T. Robinson and wife, by deed dated January 22, 1912, and recorded in liber 360, on pages 44-46, the said premises being more particularly described in that certain indenture of lease dated November 4, 1913, duly executed and entered into by Manuel Silva Novite and Ham Pong and Kong Kee.

“That said lease was, on the 9th day of January, 1915, sold by the sheriff of the county of Maui under and by virtue of an execution issued out of the circuit court of the second circuit. That Ham Pong, trustee, and Ah Sing were the purchasers of said lease at such sale and went into possession and occupation of said premises and are now in possession and occupation thereof.

“That the defendants as lessees aforesaid promised and agreed to abide by the conditions set forth in said lease and thereby promised to pay a yearly rental of \$480.00 payable quarterly in advance.

“That there is now due and owing the plaintiff herein from the defendants herein rent amounting to \$120.00 payable in advance, same being for the quarter beginning

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January 1, 1915, as set forth in the lease, a copy of which is attached hereto marked Exhibit 'A.'

"That because of covenants broken, to wit the non-payment of rent, defendants are now in possession of said premises and are holding the same unlawfully and against the rights of the plaintiff.

"Wherefore plaintiff prays that the lease hereinabove mentioned may be cancelled and annulled and that defendants may be ousted from the possession and occupation of said premises, and that plaintiff may be restored to the possession thereof."

Defendants' plea was the general issue, and the court, after hearing the evidence, rendered judgment in favor of plaintiff for the possession of the premises and for his costs. No plea to the jurisdiction was interposed in the district court, nor did it appear from the evidence there introduced that title to real estate was involved. From this judgment defendants appealed to the circuit court, second circuit, where the case was heard, jury waived. On April 20, 1915, the court filed its written decision in favor of plaintiff, and the judgment, following the written decision of the court, was that plaintiff have immediate possession of the premises, for his costs, and that execution and writ of possession issue accordingly. Judgment was duly entered and filed on April 20, 1915, and thereafter on the same date execution, namely, a writ of possession issued. It appears from the return of the officer indorsed on the writ that the same was executed on the 20th day of April, 1915, by delivering to the plaintiff possession of the premises; and it is further made to appear by the certificate of Edmund H. Hart, clerk of the circuit court of the second circuit, filed in this court on October 9, 1915, that on April 28, 1915, after the entry of judgment and before the writ of error was sued out from this court, that defendants deposited the sum of \$37.30, costs accrued, in said second circuit court. The plaintiff having been put into possession of the premises and the

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accrued costs having been paid, it is apparent that the judgment has been satisfied and there is nothing for which execution might issue. Section 2518, R. L. 1915, provides:

"A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge or magistrate, or by the decision of any court except the supreme court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment."

As will be seen, the statute modifies the common law rule to the extent that the writ must issue before the execution has been fully satisfied. *Ting v. Born*, 21 Haw. 638, 640. From what has been stated above it necessarily results that if the writ of possession was legally and properly issued the motion to dismiss the writ of error must be granted.

The judgment in this case being that of a circuit court, execution thereunder, i.e., the writ of possession, might issue at any time "unless stayed as provided by law." Sec. 2441, R.L. 1915.

There is no merit in the contention of counsel for plaintiffs in error that the plea entitled "Plea to the Jurisdiction," interposed by defendant Ah Sing in the circuit court, should have been sustained. The so-called plea to the jurisdiction is as follows:

"Comes now, Ah Sing, one of the above named defendants by Eugene Murphy, his attorney, and says that the above entitled court ought not to take cognizance of this action for the reason that at the commencement of said action and ever since thereof this defendant is in possession of the premises described in the complaint herein, not as alleged by the plaintiff under a lease from plaintiff to Ham Pong and others, but by virtue of a judicial sale of the said premises of all the right, title and interest in the said premises of the Hop Sing Company, a copartnership, duly registered; that defendant is not and never has been tenant as alleged in the complaint herein. That defendant is in possession of the premises described in the complaint herein as successor in interest, by mesne conveyances, of all the

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right, title and interest of the Hop Sing Company, a co-partnership, in and to the said premises. That therefore the defendant, Ah Sing, is the owner of all the right, title and interest of the said Hop Sing Company, a copartnership, in and to the said premises described in the complaint herein. That the defendant is not the tenant under any other leasehold."

Presumably an affidavit by the defendant Ah Sing accompanied this so-called plea in the circuit court, but the purported copy of such affidavit, as the same appears in the record before us, is not subscribed by said defendant Ah Sing or any person whomsoever. For the purposes of this appeal, however, we will assume that the affidavit was duly subscribed. The affidavit is as follows:

"Territory of Hawaii,)
"County of Maui.) ss:

"Ah Sing of full age being duly sworn on his oath according to law deposes and says that he is one of the defendants above named that he has read the foregoing plea to the jurisdiction of this court; that he knows the contents thereof and the same are true. Deponent further states that he files this plea in his own behalf for the reason that the said defendant Ham Pong herewith joined with him is not in possession of the said lands described in the complaint herein; and is not in any manner connected with deponent; nor has the said Ham Pong, as trustee, or otherwise any interest or possession in common with deponent, in the lands in the complaint herein named.

"Subscribed and sworn to before me this
19th day of April, A. D. 1915.

"Eugene Murphy (Seal)

"Notary Public, Second Circuit,
"Territory of Hawaii."

Rule 15 of this court, under the title, "Defense of Title in District Courts," provides:

"Whenever, in the district court, in defense of an action of trespass, or a suit for the summary possession of land, or any other action, the defendant shall plead to the jurisdic-

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tion in effect that the suit is a real action, or one in which the title to real estate is involved, such plea shall not be received by the court, unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim."

The reasons for the promulgation of this rule are succinctly stated in the opinion of this court in *Brown v. Koloa S. Co.*, 12 Haw. 409, 411, 412, where it is said:

"In *Ward v. Kamanaoulu*, 9 Haw. 619, in an action of trespass *quare clausum fregit*, the court held that a plea of title in defendant without adducing evidence to sustain it, was sufficient to oust the district magistrate of his jurisdiction, there being no statute or rule requiring more. 'That a remedy might have to be provided was thought of in 1879, where the court remark in *Coney v. Manele*, 4 Haw. 157, 'if dishonest pleas should be set up by defendants undoubtedly effectual means will be found to obviate the effects of such dishonesty.' A rule will be made to apply to future cases.' This case was decided February 25, 1895, and on March 1, 1895, the supreme court rule or order to the district magistrates was made."

Rule 15 of this court is only applicable in district courts, but even under the practice prevailing in those courts the affidavit above quoted is clearly insufficient under the ruling of this court in *Coerper v. Gouveia*, 21 Haw. 270, 272.

As has been stated, the jurisdiction of the district court was not questioned, nor did it appear from the evidence in that court that the title to real estate was involved. From an inspection of the plea and the accompanying affidavit filed in the circuit court it will be seen that defendant Ah Sing admits being in possession of the premises described in the complaint, but alleges that he is in possession "as successor in interest by mesne conveyances of all the right, title and interest of the Hop Sing Company, a co-partnership," etc. What interest the Hop Sing Company claimed or possessed is not stated, nor does it appear that.

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said company, or the defendants under them, had or claimed any interest or title adverse to the plaintiff. Neither the plea nor the affidavit shows that the title to real estate was in any wise involved. In fact, the plea is a mere amplification of the allegation contained in the declaration "that said lease was, on the 9th day of January, 1915, sold by the sheriff of the County of Maui under and by virtue of an execution issued out of the circuit court of the second circuit. That Ham Pong, trustee, and Ah Sing were the purchasers of said lease at such sale and went into the possession and occupation of said premises and are now in possession and occupation thereof."

Conceding the correctness of the rule contended for by counsel for plaintiffs in error, that the question of jurisdiction may be raised at any time, and that if the district court had no jurisdiction the circuit court on appeal would have none, we are of the opinion that the circuit court was not ousted of jurisdiction by the filing in that court of the plea and affidavit above set out, but might properly proceed, as it did, to hear evidence and determine whether the title was actually in question. The circuit court found from the evidence that the relation of landlord and tenant existed, and the plea was properly overruled.

It follows from what has been said that in our opinion the motion to dismiss the writ of error should be granted, and it is so ordered.

D. H. Case and *E. Vincent* for the motion.

E. Murphy contra.

DISSENTING OPINION OF QUARLES, J.

In my opinion, on an appeal in a summary possession case from a district court to the circuit court, the case being tried *de novo*, the position of the parties is not changed and any step which could properly be taken in the district court

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by the defendant can be taken in the circuit court. In my opinion the plea to the jurisdiction, filed by the defendant in this case in the circuit court, ousted that court of jurisdiction. Where the district court had no jurisdiction, the circuit court on appeal has none. This rule was decided in *Lewers & Cooke v. Redhouse*, 14 Haw. 290, the court at page 294 saying: "This being a question of jurisdiction over the subject matter, it may be raised in this court on appeal, even though the record of the district court does not show that it was raised there except in the notice of appeal filed after judgment was rendered," citing *Tong On v. Tai Kee*, 11 Haw. 424; *Wedgewood v. Parr*, 112 Iowa 514. See also *The King v. Ikeole*, 4 Haw. 413; *Roy v. Scott*, 17 Haw. 598.

In *Tong On v. Tai Kee*, 11 Haw. 424, plaintiff sued in the district court for specific performance of a contract. The case was appealed to the circuit court where plaintiff obtained judgment. The case was then appealed to the supreme court which held that the district court having no jurisdiction the circuit court acquired none. At page 427 the court said: "No plea to the jurisdiction was made below, and court and counsel proceeded with the case as if law had cognizance. But parties cannot by waiver confer jurisdiction over the subject matter upon the court. *Kona Coffee Co. v. Circuit Court*, 10 Haw. 572." In *Jardin v. Madeiros*, 9 Haw. 503, it was held that a plea of former adjudication could be made in the circuit court on appeal although not made in the district court. In *Ward v. Kamanaoulu*, 9 Haw. 619, it was held that a plea of title in the defendant in a case of trespass *quare clausum fregit* ousts the court of jurisdiction without the introduction of evidence, and this ruling was followed in *Brown v. Koloa Sug. Co.*, 12 Haw. 409.

The court has jurisdiction in cases of summary proceeding to recover possession of land "only when the relation of landlord and tenant confessedly exists" (*Kaaihue v.*

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Crabbe, 3 Haw. 776; *Coney v. Manele*, 4 Haw. 154; *Harrison v. McCandless*, 22 Haw. 129).

In my opinion the appeal to the circuit court vested it with such jurisdiction only as the district court possessed and is tantamount to the granting of a new trial of a district court case in the circuit court. Under the authorities stated the plea, which should have been, but was not, made in the district court, may yet be made in the circuit court. Our statute (R. L. Sec. 2297) withholds jurisdiction from district courts in all cases wherein the title to land is involved.

In *Coerper v. Gouveia*, 21 Haw. 270, the court at page 273 said: "In an action for summary possession, even though the evidence offered in defense may bring the title to the premises in question, it does not necessarily follow that such evidence is, for that reason alone, inadmissible. However, as section 1662, R. L. provides that district courts 'shall not have cognizance of * * * actions in which the title to real estate shall come in question,' the jurisdiction of the court ceases the instant it is discovered that 'the title to real estate' has come in question. The question of title is generally presented by plea and affidavit before the trial begins, as the defendant attempted to do in this case, but the fact may afterwards be disclosed on the trial of the case by the evidence introduced. It is immaterial, however, at what stage of the proceedings the fact is disclosed, for at that instant the proceedings must be arrested, because the court is then without jurisdiction to proceed further in the case. *Parker v. Bussell*, 3 Blackf. (Ind.) 411, 415; 12 Ency. Pl. & Pr. 675, 676, 677, 679; 11 Cyc. 699, 701."

In my opinion the plea to the jurisdiction filed was sufficient and put in issue the fact of the relation of landlord and tenant between plaintiff and defendants, as well as the fact that the defendant Ah Sing was claiming title to the

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premises in dispute under purchase at judicial sale of the claim of Hop Sing Company. I do not understand rule 15 of this court to require that the plaintiff shall in an affidavit accompanying his plea to the jurisdiction of the court de-
raign his title back to the government. I think there is enough in the plea to show that the issue of title was raised, and under the statute, irrespective of court rule, jurisdiction was ousted.

In my opinion there is no doubt but what the plea to the jurisdiction filed in the circuit court was properly filed there and ousted the court of jurisdiction in this case, for which reason it would follow that the judgment was void, and therefore the motion to dismiss the writ should be overruled.

M. A. MARTIN *v.* A. A. WILSON.

No. 858.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED NOVEMBER 29, 1915.

DECIDED DECEMBER 6, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*exceptions—order granting new trial.*

For the purpose of exceptions an order granting a new trial is regarded as a final order.

SAME—*statement of case—briefs.*

A summary of the evidence contained in the appellant's brief which is not controverted by the appellee may be adopted by the court as being a fair statement of the case.

NEW TRIAL—*verdict—sufficiency of evidence.*

A circuit judge should not grant a new trial on the ground

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merely that a verdict for the defendant was against the weight of the evidence where it cannot be said that there was no substantial evidence to support it.

MASTER AND SERVANT—negligence—omission of precautions to prevent accident.

The true question for the jury is not whether the master could have done something to prevent an injury to his servant, but whether he omitted any precaution which a prudent and careful man would or ought to have taken.

NEGLIGENCE—primarily question for jury.

The question of negligence is primarily one for the jury under proper instructions, and becomes a matter of law for the court only where there is no conflict in the evidence and but one inference can reasonably be drawn from the facts.

TRIAL—verdict—instructions.

A verdict cannot be said to be contrary to law because the jury supposedly overlooked certain instructions in a case where varying instructions were given to meet the facts as the jury might find them. It will be assumed that the jury found the facts to have been as contended for by the successful party.

OPINION OF THE COURT BY ROBERTSON, C.J.

This case comes to this court on a bill of exceptions of the defendant allowed by the circuit judge as an interlocutory bill. Thirty-seven exceptions were incorporated in the bill, thirty-four of which were to instructions given to the jury, one to the denial of a motion for a nonsuit, one to the refusal to direct a verdict for the defendant, and one to the granting of plaintiff's motion for a new trial. The jury having returned a verdict for the defendant the last exception is the only one which demands the attention of this court, and as, under the practice in this jurisdiction an order granting a new trial is, for the purpose of an exception, a final order, the allowance by the circuit judge was not required.

The plaintiff, a laborer in the employ of the defendant, claimed damages against the defendant, a contractor, for personal injuries sustained by him in the course of his em-

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ployment in the construction of a certain stone wall and by reason of the alleged negligence of the defendant in failing to provide him a safe place in which to work.

The time, place, circumstances of the occurrence and nature of the injuries sustained were alleged in the second paragraph of the plaintiff's complaint as follows:

"That on the 27th day of October, 1913, at Kapiki Gulch, District of Makawao, County of Maui, Territory of Hawaii, the defendant aforesaid was building and constructing a stone wall for the purpose of a retaining wall along the bank of Kapiki Gulch and on said date and prior thereto, plaintiff was employed and engaged in working for the defendant as a day laborer, the plaintiff's duties, being under his said employment, to deliver and assist in delivering to the stone masons and builders of said wall material for the purpose of constructing the same; and at the time of injuries to plaintiff hereinafter complained of, he was actually engaged in such services under his contract with the defendant, and as a part of his duties as such servant to the defendant. Said retaining wall had, on the date hereinabove named, been constructed to a height of about 30 feet and plaintiff was then and there on the top of said retaining wall performing his duties as such laborer in rolling and moving large stones to be placed in the wall for the purpose of further construction thereof. Plaintiff was acting in the line of his duties under his said contract and by order of the defendant and was at that time and place in the exercise of ordinary care and caution. When, without plaintiff's fault, said wall on which he was working collapsed and fell, thereby throwing plaintiff violently to the ground, a distance of about 30 feet and in falling, he was caught under some of the material of the wall, namely large pieces of stone and was thereby crushed, bruised, lacerated and wounded in such manner as that he was then and is now, as a result of said fall, permanently injured. Plaintiff's injuries so received consisted of cuts, bruises and laceration in and on various parts of his body, but his most severe and permanent injuries were to his left leg, both above and below his knee; plaintiff's leg being caught under the falling stone and debris, was torn, crushed and lacerated to such an ex-

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tent that he was thereby permanently disabled. From said injuries, he has suffered great pain and mental anguish and from the same he still suffers in like manner. The flesh and muscles were torn from the bone of his leg and were otherwise injured to such an extent that plaintiff was compelled to be taken to a hospital for treatment, where he has remained constantly from that time up to this date and where he will be compelled to remain for an indefinite period for treatment of his injuries that he received as hereinabove indicated. Plaintiff has been compelled to spend large sums of money on hospital fees, doctor's bills, nursing and medical bills; has been deprived and is permanently deprived of his means of earning a living for himself and family by reason of the injuries hereinabove described. Plaintiff will not only be permanently injured; but his physical condition from the injuries received in said accident are such as that he will probably not be able to leave the hospital and will certainly never be able to engage in his former pursuits and labor, whereby he did earn and otherwise be able to earn a living for himself and family. Plaintiff was thereby and is totally disabled to do any kind of work or labor."

The facts so set forth were substantially proved by uncontradicted evidence.

The alleged negligence of the defendant was set forth in the third paragraph of the plaintiff's complaint as follows:

"At the time of the injuries hereinabove complained of, plaintiff was in the exercise of ordinary care and caution. He was without fault in that he was performing his duties carefully and faithfully under the contract by and between himself and the defendant. The collapse and falling of said wall was due to the negligence and lack of care and skill on the part of the defendant in this that it was the duty of the defendant to provide a safe place for plaintiff to work and the defendant knew or could have known by the use of ordinary care, skill and observation, that the place provided plaintiff to work on said wall was unsafe and dangerous and this was not known to plaintiff nor could have been known to him by the use of ordinary care and observation. It was the duty of the defendant to have secured said wall from falling and collapsing by bracing

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the same with earth and other material as the same was being constructed, but this duty of the defendant was neglected by him, and by reason of the failure of defendant to perform this duty, the wall was made insecure and unsafe; and on account of this failure of the defendant to perform his duty to the laborers on said wall and particularly to plaintiff, the wall collapsed and fell and plaintiff was injured as hereinabove set out and described."

The evidence in the case is thus summarized in the brief for the defendant, and as no defect therein has been pointed out by counsel for the plaintiff, it is adopted as a fair statement of the circumstances under which the injury occurred. The testimony for the plaintiff tended to show:

"That on October 27, 1913, the plaintiff was working at Kakipi Gulch, Maui; that at that time plaintiff was injured by the giving way of a wall upon which he was at work; at that time the defendant, A. A. Wilson, had a contract to build a road for the Loan Fund Commissioners, across Kakipi Gulch, Maui; the road was being constructed by building two dry rubble retaining walls for the purpose of holding a fill which would constitute the roadway. The plaintiff had been working upon the mauka of the two walls from some time in July until he was injured in October. He was a member of a gang of three or four who were building the wall. His job was to lay and place the stones in the wall, which job included helping to roll the stones or to bring stones to the wall. Martin, the plaintiff, was really making the wall. At the time plaintiff was injured the height of the mauka wall is placed by guesses of plaintiff's witnesses at 18 or 19 feet to 25 or 30 feet at the place where the wall gave way. The break occurred 40-45 feet from the bridge end of the wall. The cross-section of the wall at such a point as shown by the specifications would fix the height of the wall at 12-13 feet at the time of the accident. A narrow gauge car track was laid along the top of the incomplete wall at this time which would fix the width of the top of the wall at this point at 5 to 7 feet. The plaintiff started work at the gulch before Christmas, 1912. He had worked on road building before. He alleges that he was laid off for about two months. This was probably during

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May and June. When he returned to the job he went right to work building wall. He recognized the risk of building this wall. In building the wall the laborers had hammers with which to chip off uneven corners, fit them into place and test their hardness. The work was of such a nature that a man of ordinary sense or judgment could perform it. When work was first begun on wall, rocks were brought from top of gulch. The wall in question was built with a batter or slope on the outside and vertical on the inside. When plaintiff went to work on the wall, he alleges that it had already been built up to about one-half of its height at the time of the accident. The plaintiff also alleges that he helped start that part of the wall 40 to 45 feet from the bridge end. His other witnesses put the place of the accident at 40 to 45 feet from the bridge end. The wall was not built straight up in reference to its cross-section but was begun in slanting benches. The part of the wall on which plaintiff was working on October 27, 1913, slid or sunk inwards. A scoop shaped portion of the wall slid inwards. A higher portion of the wall than that which fell was left standing after the accident. (There is a conflict in the plaintiff's evidence as to how much of the inside of the wall was left standing after the accident. Plaintiff, himself, alleges he couldn't see. One witness alleges it fell to within two feet of the ground on the inside and eight feet on the outside of the wall. Another alleges that most of the outside of the wall stood up and enough of the rest to make the wall about eight feet wide at the top of the break and about half of the wall was still standing.) Plaintiff rolled down with the sinking wall and was injured by a large stone which fell on his leg. A fellow laborer whose ankle and back had been hurt in the accident lifted the stone from the plaintiff's leg. The plaintiff was then cared for and as soon as possible taken to the nearest hospital for treatment. At the time of the accident the makai wall which was to help retain the fill for the road was not very high, less than one-half of the height of the mauka wall which fell."

The testimony adduced by defendant tended to show:

"That the men in charge of the construction work referred to in the evidence of plaintiff, were all competent men, having had considerable experience in the matter of

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road construction and the building of dry rubble retaining walls. The experience of Mr. Howell, who had general oversight over the job as partner of defendant, A. A. Wilson, is shown on pages 189, 190, 207 and 208 of the transcript of evidence. Mr. Brune was in charge as supervising engineer for the loan fund commission under whom the contract for building the road was let. Mr. Hutchins was foreman of the job and a man of experience in this line of work. Mr. Lada, general efficiency man, resident at the construction camp, was a man of considerable training and ability in engineering work. The building of the wall in question was inspected frequently. Mr. Howell and Mr. Brune inspected at least once or twice a week prior to the accident. Mr. Hutchins, the foreman in charge of the work, inspected the work of the laborers upon the wall several times each day. Mr. Lada was on the wall about twice every day for the purpose of measuring the same and keeping unit costs in the construction of the same. Mr. Wilson, the defendant, examined the wall in person and carefully at least once a month. The wall was frequently relaid when not built to the satisfaction of those inspecting it. The construction being undertaken at the Kakipi Gulch extended over a distance of from one-half to one mile and was under the personal charge of Mr. Hutchins, the foreman. Mr. Hutchins had three foremen under him on the whole job. Frequent instructions were given as to the method and manner of building the dry rubble retaining wall in question; to the foreman, Mr. Hutchins; to the foreman in the presence of plaintiff; to the men engaged in building the wall including the plaintiff. (The plaintiff denied that any instructions were ever given to him.) The plaintiff himself worked on the wall during part of June, all of July, August, September and October, 1913. Plaintiff started his experiences at the gulch as a wall builder in February, 1913. Plaintiff represented himself to Mr. Hutchins as a stone wall builder. (This was denied by the plaintiff.) Plaintiff showed by his workmanship on the wall that he knew how to lay stone in constructing a stone wall. Immediately after the accident and while waiting for the ambulance, the plaintiff laid the blame for the accident on the poor work of his fellow workmen. (This was denied

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by the plaintiff.) The height of the mauka wall at the place where the break occurred and before the accident was placed at fourteen to sixteen feet. After the accident one-half of the original height of the place of the break still remained standing being about seven to eight feet on the outside and about six feet on the inside of the break. The break occurred forty to fifty feet from the bridge end of the wall. The highest point of the wall which had been built prior to the accident did not fall. In the first part of July, 1913, no part of the wall had been built at or about the place where the accident later occurred. Plaintiff was a wall builder upon the mauka wall at the time. The wall was constructed from the bridge end backward, stone being brought to the builders by a portable track laid upon the ground and wall. The stones were laid in bond, that is with over-lapping joints. Stones were well scabbled. They were well bonded. Hard stones were used in the wall. The difference between hard and soft stones is easily differentiated by lifting them or by tapping them with a hammer, and by the ordinary common sense of the stone layer. The wall was about nine feet at the base at the place of the accident, sloped on the outside three inches to a foot in height and was vertical on the inside. Long stones were laid at frequent intervals transversely through the wall and well bonded, the maximum stone being under five and one-half feet. The phrase 'long stones stretching through the wall' is to a practical engineer a somewhat technical phrase, indicating the direction of placing long stones and a continuation through the wall by bonding and lapping such stones. (The evidence on this point was elicited by the counsel for the plaintiff himself. The court refused to allow the counsel for the defendant to go into this matter, cutting off questioning as to binding of stones.) Definite instructions were given from time to time by Mr. Howell to build the wall with ample dimensions. The slopes for building and constructing the wall were carefully laid out from time to time by means of plumb lines and bamboo poles by the foreman, Mr. Hutchins, and by Mr. Brune, the supervising engineer. The specifications for the wall in question called for a base of between $7\frac{1}{2}$ feet to 8 feet, a vertical face on the inside, a slope on the outside of 3 inches inward for every rise of a

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foot in height, when completed of 22 feet, making the wall two feet wide at the top when completed. Practically the wall was about nine feet wide at the base at the place of the accident. After the accident and after the debris had been cleared away the method of construction went on the same as before the accident, the walls being nearly complete before any appreciable fill was put in. (This is questioned by a witness for the plaintiff.) The wall in question was built as a retaining wall, which is a wall designed to hold a fill. Such a wall should be self-supporting. In the construction of such a wall, a fill between two retaining walls is not necessary for the purpose of holding up the wall. (A retaining wall is compared with other kinds of walls and defined by some of the witnesses. The contract and specifications are silent as to when the fill should be put in. Such a wall as the plaintiff was constructing would not be a *retaining* wall if it could not stand alone. (The formula introduced by the counsel for the plaintiff in cross-examination of defendant's witnesses by the counsel for the plaintiff sought to show that the dimensions of the wall in question were faulty are all formally designed for the purpose of meeting the pressure which results *after* a fill has been put in.) Between the walls in question there was a slight waste fill. A larger fill is not put in during the progress of wall in order to make more efficient inspection possible. The foundation of the wall in question was better than that contemplated by the contract. The foundation was approved by the loan fund engineer, Mr. Brune. A boulder foundation such as used in this construction is a good substantial foundation. The break in the wall which caused the accident occurred suddenly. The wall slid out in a scoop shape. Those familiar with this form of construction give several explanations for the accident. The wall might have fallen in by the crushing of a soft stone, or by the slipping of a wedge shaped stone improperly placed. The break could have started above the part which was left standing. The kind of wall under construction and the method of construction was pronounced by expert evidence as efficient, proper and safe engineering. It is unnecessary to brace a retaining wall of the description of the wall in question. One of the expert witnesses testified to having

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built a wall one hundred feet high under specifications similar to those used in this case. Ordinary laborers were competent to construct such a wall."

The precise cause of the wall's falling was not shown. In overruling the defendant's motion for a nonsuit, made at the close of plaintiff's case, on the grounds that there was no evidence to sustain the allegations in the complaint as to negligence; that there was no evidence of negligence on the part of the defendant; and that the defendant assumed all risks incidental to the work; the court said: "it is a question that the jury should decide," and the case was finally submitted to the jury under elaborate instructions given at the request of respective counsel and by the court of its own motion. Many objections were made by the defendant to the instructions, but we are not now concerned with them, it being enough for present purposes to note that the charge given to the jury appears, on the whole, to have been very favorable to the plaintiff. Indeed, the plaintiff's motion for a new trial assigned no error of law on the part of the court either in the charge given to the jury or otherwise, the motion being based upon the grounds that in arriving at their verdict the jury had overlooked certain of the instructions, and that the verdict was "contrary to the law and the weight of the evidence." The plaintiff does not contend that the trial was not conducted fairly or properly in any respect. In an elaborate opinion the trial court granted the motion for a new trial upon the grounds that "under the principle of law that 'the thing speaks for itself,' it is clear that there was some vital error in the construction of the wall on which plaintiff was working;" that the defendant had failed to comply with the terms of his contract with the public authorities providing that "The contractor must have at all times a competent man in charge of the work, if not himself, then someone to act for him as if he was present;" that "The contractor is

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expected personally to inspect the ground and satisfy himself as to the conditions" etc.; that the "Foundation of wall to be of firm material excavated in benches at least two feet wide;" that "The wall to be built of hard stones of good size and shape suitable for bonding, that is, approximately parallel top and bottom faces, to be laid in courses with broken joints and good bond, to have frequent binders, long stones extending through the wall * * * foundation of wall to be on firm material excavated in benches at least two feet wide. No wall to be built until the foundation be approved by the engineer or his authorized representative;" also that as it appeared by the uncontradicted evidence that the space between the two walls was not filled up as the work progressed, and that the wall in question could not have fallen in as it did if such filling had been done, and this in face of the fact that binding stones as required by the contract were not put in, and the wall having been built upon a foundation "that may have and probably did slip," negligence on the part of the defendant was shown, and the jury, it would seem, "clearly failed to appreciate the situation and that their verdict was against all the evidence in the case;" that the plaintiff did not receive proper care and treatment at the hospital to which he had been taken; and, finally, that as there was no evidence tending to show negligence on the part of a co-employee, or contributory negligence, or assumption of risk on the part of the plaintiff, there was possible error in giving instructions on these points.

On behalf of the defendant the contention is advanced that the doctrine of *res ipsa loquitur* has no application in an action for negligence by a servant against his employer; that the "safe place" rule, so-called, does not apply in such an action where the injury occurred in the doing of construction work; and that as there was no evidence to sustain the allegation of negligence on the part of the defendant

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the plaintiff could not recover, and a verdict for the defendant should have been directed. In the view we take of the case it will not be necessary to consider this contention. We will assume, against this position of counsel for the defendant, that the case was properly submitted to the jury; that the jury could have found from the evidence that there was negligence on the defendant's part; and that a verdict for the plaintiff could not have been disturbed because of the rule that a verdict for the plaintiff cannot be set aside merely as being against the weight of the evidence where there is more than a mere scintilla of evidence to support it. *Robinson v. H. R. T. & L. Co.*, 20 Haw. 426. But from the assumption that the fact that the wall fell was some evidence of "some vital error" in its construction, and that the "safe place" rule applied to the condition of the wall in so far as its construction had progressed at the time the plaintiff returned to the employment, it would not follow as a matter of law that the defendant was liable, for the evidence did not show, but the jury were left to infer from all the circumstances, if they were able, what the defect was, in what part of the wall it occurred, and when and by whom it was caused. And if it was caused by the defective work of the plaintiff himself, or solely by the negligence of his fellow servants, without the knowledge, actual or implied, of the defendant, he being without fault in the premises, the plaintiff was not entitled to recover damages from the defendant. It may be said that there was no evidence tending to show negligence on the part of the plaintiff's fellow workmen, or contributory negligence on the part of the plaintiff, but it can with as much force be said that it did not appear what caused the wall to fall, and that there was no direct evidence that there was a defect in the wall of which the defendant was aware or should have known. And if the falling of the wall be considered as *prima facie* evidence of

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defective construction, there was, on the other hand, affirmative evidence from which the jury could have found that the wall was being constructed in a reasonably safe manner, by competent workmen, under adequate supervision. The matter involved questions of fact, and the principle of the *Robinson* case, *supra*, applies as well in a case where the verdict was for the defendant if it cannot be said that the verdict was not supported by evidence. *Campbell v. Hackfeld*, 20 Haw. 245.

We are of the opinion that the trial court erred in granting a new trial upon the ground that in certain particulars the defendant did not comply with the requirements of his contract with the loan fund commission in regard to the method of construction of the wall. Aside from any questions of fact that may have been involved as to whether the defendant did in fact fail to observe the provisions of his contract, which would have been for the jury to answer, there was the further question for the jury to decide upon the evidence whether the departure from the terms of the contract resulted in an unsafe wall or whether, notwithstanding that fact, the method of construction pursued was a reasonably safe and prudent one under all the circumstances. It cannot be said that the failure of the defendant to construct the wall in the method prescribed by his contract was, as matter of law, negligence on his part and the proximate cause of the plaintiff's injury. The method of construction followed by the defendant concerned the other party to the contract, but did not concern the plaintiff unless it constituted negligence which caused his injury, and that question, as we have just said, was one for the jury to decide. In *Mejea v. Whitehouse*, 19 Haw. 159, 161, where a government contract required that the contractor should "provide such precautions as may be necessary for the prevention of accidents to life or property and shall assume the responsibility of all damages or costs

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resulting therefrom," this court said, "we cannot construe this as a contract of insurance for the benefit of the employees." The defendant at most owed the plaintiff the duty of providing him a safe place in which to work, and to pursue a reasonably safe method of construction, but he owed him no duty to exactly follow the terms of the contract with the loan fund commission. The known risks of ordinary perils incident to and inherent in doing work of such character as that involved here were, of course, assumed by the plaintiff. Plaintiff's counsel makes no contention to the contrary. We think, likewise, that the court erred in assigning as a reason for granting a new trial the fact that the space for the roadway between the two walls had not been filled up as the wall-building progressed, regarding it as conclusive evidence of negligence on the part of the defendant. Here the court substituted its judgment for that of the jury, and turned a question of fact into a matter of law. To say that the wall could not have fallen as it did if the roadway had been filled in does not solve the question, for the method of construction may have been prudent and appropriate, and the wall reasonably safe without the filling being done, and the jury could have found this from the evidence. "The true question for the jury is not whether the master could have done something to prevent the injury; but whether he did anything which, under the circumstances, in the exercise of ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken." 3 Labatt's Master and Servant (2nd ed.), p. 2502. See *Southern Pacific Co. v. Seley*, 152 U. S. 145; *Foley v. Pettee Machine Works*, 149 Mass. 294; *Leonard v. Collins*, 70 N. Y. 90; *Naylor v. C. & N. W. R. Co.*, 53 Wis. 661; *Grattis v. K. C. P. & G. R. Co.*, 153 Mo. 380, 404; *Simmons v. C. & T. R. Co.*, 110 Ill. 340, 347; *Hewitt v. F. & P. M. R. Co.*, 67 Mich. 61. Actionable

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negligence consists in the failure to do what a reasonable and prudent person would ordinarily have done under given circumstances, as well as the doing of what such person would, under the circumstances, not have done. In either case the question of negligence is primarily one for the jury under proper instructions, and becomes a matter of law for the court only where there is no conflict in the evidence and but one inference can reasonably be drawn from the facts. 29 Cyc. 629; *Ward v. I. I. S. N. Co.*, 22 Haw. 66 and 488, and numerous cases cited in those opinions. The application of this well established rule to a case where, as here, the negligence alleged was not clearly shown and could be found, if at all, only from a combination of facts depending to some extent upon conflicting testimony and involving a consideration of what was reasonable and prudent under all the circumstances, and the proximate cause of the plaintiff's injury was left to inference from such testimony and circumstances, can lead to but one conclusion, namely, that the question was for the jury and that the verdict settled it.

We find, therefore, that the reasons given by the court below for granting the motion for a new trial were unsound and cannot be sustained. The motion itself based, as above stated, on the grounds that the jury had overlooked certain of the instructions given by the court and that the verdict was contrary to the law and the weight of the evidence, was ill founded. In a case such as this, where instructions are given advising the jury as to what their verdict should be under different views of the evidence and according to how they might find the facts, it is impossible to say that in arriving at a verdict for the defendant the jury overlooked those instructions which would have required a verdict for the plaintiff had they found certain facts to have been established. Rather must it be assumed that the jury found the facts to have been as contended for by the

Quarles, J., concurring.

successful party. Finding as we do that the verdict rendered was supported by substantial evidence we are not concerned with the question whether it was supported by the weight or preponderance of the evidence.

The exception to the order granting a new trial is sustained and the order is set aside. The case is remanded to the circuit court.

J. Lightfoot for plaintiff.

A. M. Cristy (*J. W. Cathcart* and *Frear, Prosser, Anderson & Marx* with him on the brief) for defendant.

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion reached in this case. I have carefully examined the instructions given by the trial court and find that such instructions were ably given and fully cover all of the points of law to have been considered by the jury and were very fair, and I am of the opinion that no prejudice resulted to the plaintiff, appellant, from any of said instructions. It is well settled in this jurisdiction that where the proximate cause of an injury is in doubt or to be inferred from one or more different state of facts, the question of proximate cause is one for the jury and not for the court. Under this rule the trial court properly submitted to the jury the question of proximate cause. As shown by the evidence in the case, the accident *might* have been caused by one or more conditions and might not have been caused by any act on the part of the defendant but by negligence on the part of the plaintiff and his fellow workmen. The question having been fairly left to the jury, and the jury having found in favor of the defendant, and therefore finding that the proximate cause of the injury was not traceable to any neglect of the defendant, the verdict of the jury should not be disturbed. To set the verdict aside and grant a new trial is not in harmony with the rule announced in *Robinson v. H. R. T. & L. Co.*, 20 Haw. 426,

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and in *Ward v. I. I. S. N. Co.*, 22 Haw. 66 and 488, and under the established rule of those cases the verdict was erroneously set aside. While a large discretion is vested in trial courts in the matter of granting new trials, yet where there is evidence supporting the verdict and no prejudicial error of law committed during the trial it is an abuse of discretion to set the verdict aside, although the trial judge may be firmly convinced that under the law and the evidence the jury should have arrived at a different verdict from that returned. Personally I feel that if I had been a member of the jury I would have felt that it was my duty, under the court's instructions and the evidence in the case to have returned a verdict in favor of the plaintiff, but, the case being fairly submitted to the jury, upon evidence more or less conflicting, and the question of proximate cause having been submitted to it, I am of the opinion that the verdict should stand. I will quote the closing sentence in instruction No. 2, given by the court to the jury, as follows: "But if it (the wall upon which plaintiff was working) became unsafe subsequent to that time (the time plaintiff commenced work on the wall) on account of the acts of the plaintiff, or the plaintiff and his co-employees, it would not fall within the rule requiring the master to furnish a safe place to work." This and other instructions informed the jury that the plaintiff could not recover if the accident resulted from his own negligence or that of his fellow employees, and under my view of the evidence, which covers nearly four hundred typewritten pages, the jury could have found from the evidence that the accident resulted from negligence of plaintiff and his fellow workmen or could have found that the accident resulted from the negligence of the defendant. Under this state of facts the verdict is binding upon the court and should not be disturbed.

Syllabus.

TERRITORY v. JAMES J. OVERBAY.

No. 883.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED DECEMBER 7, 1915.

DECIDED DECEMBER 15, 1915.

**ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE DICKEY
IN PLACE OF QUARLES, J., ABSENT.**

STATUTES—*code or revision—construction.*

In case of ambiguity or repugnancy in a code or revision of laws the original legislation may be referred to as an aid to correct interpretation. Statutes carried into a revision retain their original effect unless an intent to make a change is clear, and in case of a repugnancy the later original enactment will prevail over the earlier.

SAME—*Sec. 3937 R. L. 1915 construed.*

The words "at hard labor" in lines 7 and 8, Sec. 3937 R. L. 1915, held to be inoperative in view of the provisions of sections 1461, 1771 and 1772.

EMBEZZLEMENT—*district courts—jurisdiction.*

The offense of embezzlement where the value of the property involved amounts to \$20 but is less than \$100 is not an infamous offense. A district court has jurisdiction to hear and determine a charge of such offense subject to appeal to the circuit court in the absence of a demand for a jury trial in the first instance.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant was convicted in the district court of Honolulu upon a charge of having embezzled the sum of thirty dollars, the property of another, on the 6th day of August, 1915, and, under the provisions of section 3937 of the Revised Laws, 1915, was sentenced to be imprisoned for the term of six months and to pay the costs of court.

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He appealed to the circuit court. That court, entertaining a doubt as to whether, under the statutes of this Territory, the district court had jurisdiction to hear, determine and pronounce sentence in the case, and, therefore, doubting whether the circuit court had jurisdiction to entertain the appeal, decided to reserve the question for the consideration of this court.

Whether or not the district court had jurisdiction to try the defendant depends upon whether the offense with which he was charged was an infamous offense, for if it was the defendant could have been tried only in the circuit court upon an indictment or presentment of the grand jury. Whether or not the offense with which the defendant was charged is an infamous offense, and, therefore, the answer to the question reserved, involve the consideration and construction of certain provisions of the Revised Laws, which we will now take up.

In this jurisdiction an offense that is punishable with death or with imprisonment for a longer period than one year is a felony, otherwise it is a misdemeanor. R. L. 1915, Sec. 3662. The punishment for the offense of embezzlement, where the value of the property involved "be to the amount of twenty dollars and less than one hundred," is stated to be "imprisonment at hard labor not more than one year, or by fine not exceeding three hundred dollars." R. L. 1915, Sec. 3937. Section 1461 of the Revised Laws (originally Act 59, S. L. 1905) provides, however, that no person committed upon conviction of a misdemeanor shall be subjected to any infamous punishment. Persons convicted upon such a charge would, therefore, be confined in the Honolulu jail, wherein "no person convicted of a felony or suffering infamous punishment" shall be confined, and "no person confined therein shall be subject or compelled to perform labor during the term of his imprisonment." R. L. 1915, Sec. 1772. On behalf of the Territory, in a carefully

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prepared brief, it is contended that upon a proper construction of the statutes it should be held that the provision for hard labor in section 3937 is inoperative; that neither hard labor nor any infamous punishment may be imposed upon one sentenced under the above quoted part of that section, and that, therefore, the offense of which the defendant was convicted is not an infamous offense. The case of *Ex Parte Higashi*, 17 Haw. 428, is relied on and the argument is made that the question involved here was decided there, and that no change of circumstances has occurred which could lead to a different result.

In *Ex Parte Higashi*, decided in 1906 upon a petition for a writ of *habeas corpus*, the petitioner had been convicted in the district court of Honolulu of the offense of aiding and assisting in maintaining a lottery contrary to section 3173 of the Revised Laws, 1905 (now Sec. 4170, R.L. 1915), a misdemeanor, and sentenced to imprisonment for thirty days, though the statute (R. L. 1905, Sec. 3179; now R. L. 1915, Sec. 4178) provided for imprisonment "at hard labor," and the question there was as to the effect upon the statute of the provisions of Acts 58 and 59 of the Session Laws of 1905, which have become respectively sections 1771, 1772 and 1461 of the revision of 1915. Those acts, this court held, had the effect of repealing the "hard labor" provision and of preventing the imposition of infamous punishment upon persons convicted of misdemeanor. We do not doubt the correctness of the decision in that case, and it must be regarded as a controlling authority unless the fact that the legislature, in enacting the Revised Laws of 1915, which retained the "hard labor" provision in section 3937 (as well as in the case of many other misdemeanors), yet included also the provisions of Acts 58 and 59 of the laws of 1905, has materially altered the situation.

In compiling the revision of 1915, the commissioners might well have omitted from section 3937, and analogous

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sections, the words "at hard labor." But the legislature is presumed to have known of the construction given the various provisions of law by the court in the *Higashi* case, so that the retention of those words, under the circumstances, might be attributed to an oversight. "Where a later statute repealed by implication a provision in a prior statute and afterwards both statutes were incorporated into, and reenacted, without change, as parts of a revision, it was held that the reenactment of the repealed provision was an oversight, and that it remained without effect." 2 Lewis' Sutherland, Stat. Con. (2nd ed.), p. 858, citing *Lyon v. Ogden*, 85 Me. 374. Other and more weighty considerations also lead to the conclusion that the effect of the several provisions construed in the *Higashi* case has not been changed by the revision of 1915. Upon the extension to this Territory of the guaranties of the Federal Constitution several changes in the procedure in criminal cases were made necessary, others advisable. Chief Justice Frear, in his report to the legislature at its 1905 session, recommended that "provision should be made by which no misdemeanor may be imprisoned in Oahu prison or other similar institution; in other words, only those punishable by imprisonment for more than one year should be subject to imprisonment in an institution which may be likened to a state penitentiary. * * * Further provision should be made by which no misdemeanor may be subjected to any punishment that may be infamous, whether such punishment is imprisonment in an institution of the character of a State penitentiary or other punishment." The enactment of Acts 58 and 59 at the Session of 1905, followed. The object, of course, was to avoid the necessity of grand jury action in cases of misdemeanors conviction of which up to that time entailed confinement with felons and at hard labor. The reason for the legislation of 1905 is as forceful now as it was then. In case of ambiguity or repugnancy in

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a code or revision the original legislation may be referred to as an aid to correct interpretation. *Viterbo v. Friedlander*, 120 U. S. 707, 726; *United States v. Lacher*, 134 U. S. 624; *Morganton M. & T. Co. v. Andrews*, 165 N. C. 285, 292; *Stevens v. State*, 159 S. W. (Tex.) 505; *Cummings v. Everett*, 82 Me. 260, 264. Statutes carried into a revision retain their original effect and appropriate construction unless the legislative intent to make a change is clear. This is particularly so where a statute has been construed before its incorporation into the revision. *Crenshaw v. United States*, 134 U. S. 99, 108; *Foster v. Curtis*, 213 Mass. 79, 85; *Hooper v. Creager*, 35 L. R. A. (Md.) 202; *French v. Commissioners*, 64 Me. 583, 586. The rule of construction that where a general statutory provision conflicts with a special or particular provision the latter will be construed as an exception and both may stand accordingly, ought not to be applied where, as here, it would defeat the evident intent of the legislature. Nor does the fact that the Revised Laws were enacted as a whole render applicable the rule that where two clauses in a statute are in irreconcilable conflict the one later in position will prevail. For, though enacted as one statute, the fact remains that the revision is composed of many statutes passed at different times, and in construing provisions contained in a revision, as in construing a series of acts relating to one subject, in cases of difficulty, the history of the legislation and its purpose ought to be considered. And the general rule is that in construing repugnant provisions contained in a statutory revision or code the provisions of the later original enactment will prevail over the earlier regardless of the relative position of the provisions in the revision, for the intent and purpose of the legislation has not been changed. 1 Lewis' Sutherland, Stat. Con. (2nd ed.), p. 543; *Gaines v. Marye*, 94 Va. 225, 227; *Williams v. W. & A. R. Co.*, 83 S. E. (Ga.) 525; *Hooper v. Creager*, *supra*.

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The problem in the case at bar is not precisely the same as that which was solved in *Ex Parte Higashi*. There it involved an implied repeal of a part of an earlier statute by a later modifying act. Here it involves the effect of two repugnant provisions enacted by the legislature in the one revision. But the result is the same. We hold that the offense of which the defendant was convicted is not an infamous offense, and that in the absence of a demand on his part for a jury trial in the first instance the district court had jurisdiction to hear and determine the case. R. L. 1915, Sec. 2299. The circuit court, therefore, has jurisdiction to try the case upon the defendant's appeal.

The case is remanded to the circuit court.

W. T. Carden, Second Deputy City and County Attorney of Honolulu, for the Territory.

IN RE TAXES, C. BREWER & COMPANY, LIMITED.

No. 884.

APPEAL FROM TAX APPEAL COURT, FIRST CIRCUIT.

ARGUED DECEMBER 13, 1915.

DECIDED DECEMBER 20, 1915.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE
WHITNEY, IN PLACE OF QUARLES, J., ABSENT.

TAXATION—*excise tax on privilege*.

The tax imposed by Sec. 3361, R. L. 1915, on insurance companies and corporations, which is computed on the gross earnings of such companies from all risks located in, and from all business done within, the Territory, is an excise tax for the privilege of doing business within the Territory.

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SAME—*income tax—double taxation.*

That an income is derived from commissions paid out of gross premiums received by fire insurance companies and that such companies pay a privilege tax based on the amount of such gross premiums does not render a tax on such income double.

OPINION OF THE COURT BY WATSON, J.

This is an appeal by C. Brewer & Company, Limited, a Hawaiian corporation, from a decision of the tax appeal court of the first judicial circuit assessing an income tax against it on the sum of \$19,133.02 received by said company as commissions for acting as agent for certain foreign fire insurance companies doing business in this Territory. There is no dispute as to the facts which were agreed upon in the tax appeal court as follows:

“The amount of taxable income returned by C. Brewer & Co. for the year ending December 31, 1914, was \$110,470.33. The tax assessor assessed the amount of taxable income of the said C. Brewer & Co. Ltd. for that year at \$129,603.33. The difference of \$19,133.02 represents the amount paid to said C. Brewer & Co. Ltd. by the fire insurance companies (none being domestic companies) for which it was the agent, as commissions on the business done by said insurance companies for that year. On this amount the two per cent. income tax is \$382.66. The said companies have paid the taxes imposed on them by law for the year ending December 31, 1914, and such taxes were computed on the gross premiums received by them and included the aforesaid sum of \$19,133.02 paid to said C. Brewer & Co., Ltd., as aforesaid.”

The main point relied on by appellant is that the assessment of an income tax on said sum of \$19,133.02 to C. Brewer & Company, Limited, “constitutes double taxation, as the said sum has already been subjected to a tax for the same taxation period, which said tax has been duly paid.” In support of this contention it is urged that the insurance

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companies were required to pay, and paid, a tax of two per cent. on the gross premiums received by them respectively from all risks located in, and from all business done within, the Territory for the year ending December 31, 1914, less return premiums and reinsurance (Sec. 3361, R. L. 1915); that the commissions paid to appellant for representing such companies as agent are part of such gross premiums, and that to assess an income tax against C. Brewer & Company, Limited, upon that portion of its income received by it as such commissions would be requiring the same property to bear a double burden and to make a double contribution to what is practically the same tax.

In view of our conclusion that under the facts in this case there is no double taxation, we do not find it necessary to discuss the other points argued by counsel, which are predicated upon the theory that by reason of such supposed double taxation the appellant and the insurance companies are illegally discriminated against. (To the effect that duplicate taxation is not necessarily invalid, see *Robertson v. Pratt*, 13 Haw. 612; *Cooley on Taxation*, p. 158 et seq.)

The tax imposed by section 3361, R. L. 1915, upon insurance companies or corporations is not a property tax nor an income tax, nor is it in any sense analogous to either, as argued by counsel for appellant. That section reads as follows:

“All insurance companies or corporations doing business in this Territory must file with the commissioner annually, on or before the first day of June, in each year hereafter, a statement, under oath, setting forth the amount of gross premiums received by said companies or corporations, during the year ending December 31, next preceding, from all risks located in, and all business done, within this Territory. All such insurance companies or corporations, except life insurance companies, shall pay to the treasurer,

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through the insurance commissioner, a tax of two per cent. on the gross premiums received from all risks located in, and from all business done within this Territory, during the year ending on the preceding 31st day of December, less return premiums, re-insurance in companies or corporations authorized to do business in this Territory, when such re-insurance is placed through or with local agents, and all life insurance companies shall pay to the treasurer, through the insurance commissioner, a tax of two per cent. on the gross premiums received from all business done within this Territory, during the year ending on the preceding 31st day of December, less return premiums, re-insurance in companies or corporations authorized to do business in this Territory, when such re-insurance is placed through or with local agents, and operating and business expenses, which taxes, when paid, shall be in settlement of all demands of any taxes or licenses or fees of every character imposed by the laws of the Territory, excepting property taxes, and the fees set forth in section 3360, for conducting said business of insurance in said Territory. Said taxes shall be due and payable on the first day of July, succeeding the filing of the statement provided for in this chapter. Any organization failing or refusing to render such statement and to pay the required taxes above stated, for more than thirty days after the time so specified, shall be liable to a penalty of twenty-five dollars for each day of delinquency, and the taxes may be collected by distraint, and the penalty recovered by an action to be instituted by the commissioner in the name of the Territory, in any court of competent jurisdiction, and the commissioner shall revoke and annul the certificate of authority of such delinquent organization until such taxes and fine, should any be imposed, are fully paid."

By its terms the tax of two per cent. on gross premiums is "in settlement of all demands of any taxes or licenses or fees of every character imposed by the laws of the Territory, excepting property taxes and the fees set forth in section 3360 *for conducting said business of insurance in*

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said Territory;" and by section 1306, R. L. 1915, which provides for the payment of an income tax by corporations, insurance companies, taxed on a percentage of the premiums are expressly exempted from the payment of an income tax.

The tax imposed by section 3361, R. L. 1915, is an excise tax imposed on insurance companies or corporations, whether of domestic or foreign origin, for the privilege of doing business within the Territory. It is so declared in the statute which imposes it. *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 228; *Southwestern Oil Company v. Texas*, 217 U. S. 114; *Equitable Life Society v. Pennsylvania*, 238 U. S. 143, 146; *Ohio Tax Cases*, 232 U. S. 576, 592; 37 Cyc. 839, 841.

"There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred." *Maine v. Grand Trunk Ry. Co.*, *supra* p. 229.

In *Ohio River & W. Ry. Co. v. Dittney*, 203 Fed. 537, 540, the court said:

"While the mere declaration of the General Assembly that the tax is an excise tax does not make it so, if it is apparent that it cannot be consistently so designated, nevertheless the declaration of the lawmaking body is entitled to much weight. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 145, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann Cas. 1912B, 1312. In view of the decisions, state and federal, it is plain that the tax in question is an excise tax on the doing of corporate intrastate business; the gross intrastate business being the yardstick or measure of taxable value. *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218; *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721; *Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521; *Express Co. v. State*, 55 Ohio St. 69, 44 N. E. 506; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672; *Thomas v. U. S.*, 192 U. S. 363.

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24 Sup. Ct. 305, 48 L. Ed. 481; Cooley Const. Lim. (6th ed.) 608; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164."

On the subject of "double taxation" the following appears in the opinion of the court on page 549:

"The further charge is made that, inasmuch as plaintiffs each pay a property tax, the tax provided by the act in question is not permissible, in that it denies them the equal protection of the law by subjecting them to double taxation. This cannot be true, because the exaction of 4 per cent. of the gross intrastate earnings is not a property tax, but is an excise tax, the amount of which is fixed and measured by the amount of such earnings. Double taxation in a legal sense does not exist, unless the double tax is levied upon the same object within the same jurisdiction. *Bradley v. Bauder*, 36 Ohio St. 28, 35, 38 Am. Rep. 547. The plaintiffs pay but one tax on property, and another as an excise tax. The taxation, therefore, is not double. *Southern Gum Co. v. Laylin*, 66 Ohio St. 596, 64 N. E. 564."

In affirming the *Ditney* case on appeal the supreme court of the United States, in an opinion written by Mr. Justice Pitney, said:

"It is contended that the act is in effect a double tax upon property, and hence lacking in the uniformity required by the state constitution. But, as was pointed out by the District Court, the exaction of four per cent. of the gross intrastate earnings is not a property tax but an excise tax, whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation; hence the taxation is not double. *Bradley v. Bauder*, 36 Oh. St. 28, 35; *Southern Gum Co. v. Laylin*, 66 Oh. St. 578, 596." *Ohio Tax Cases*, *supra*, pp. 593, 594.

In our opinion the fact that an income is derived from commissions paid out of gross premiums received by fire

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insurance companies, and that such companies pay a privilege tax based on the amount of such gross premiums, does not render a tax on such income double.

The decision of the tax appeal court is affirmed.

J. W. Cathcart (*Thompson, Milverton & Cathcart*) on the brief for the tax payer.

I. M. Stainback, Attorney General, for the tax assessor.

CHARLES REINHARDT *v.* COUNTY OF MAUI.

No. 899.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED DECEMBER 17, 1915.

DECIDED DECEMBER 23, 1915.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE
WHITNEY, IN PLACE OF QUARLES, J., ABSENT.

COUNTIES—*liability for torts—defective highway.*

A county in Hawaii is liable in damages for nonfeasance in failing to repair a defect in a public highway or to guard against injury therefrom resulting in personal injury to one lawfully traveling on the highway.

OPINION OF THE COURT BY ROBERTSON, C.J.

This case comes to this court upon an interlocutory bill of exceptions allowed by the circuit court to a decision overruling a general demurrer to the plaintiff's complaint.

In his complaint the plaintiff alleged that at all times mentioned therein he was a resident of Hana, County of

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Maui, a political subdivision of the Territory; that the county had and has the general supervision, charge and control of all public highways, roads and streets within the county; that in the month of April, 1915, owing to heavy rains and freshets in the district of Hana a certain culvert or bridge in the "Hana-Nahiku" road, a main highway in said district, was washed away and destroyed, thereby causing and leaving an open, uncovered and dangerous trench or ditch of great depth and width over and across said highway; that said defect in the highway was not repaired or guarded but was negligently permitted by the defendant to remain in its exposed and dangerous condition until the 29th day of July, 1915; and that on the night of the last mentioned date the defendant, without knowledge of the dangerous condition of the highway, and without any fault or negligence on his part, but because there was no guard or signal to warn persons of the danger, fell into said trench or ditch and thereby received great bodily injuries for which he claimed damages from and against the county.

The contention made on behalf of the defendant in support of its demurrer is that the county is not liable for damages for personal injuries resulting from the negligent failure to repair a public highway. We do not agree with counsel for the plaintiff that this point may not be raised by demurrer. R. L. 1915, Sec. 2360.

The argument of counsel for the defendant is to the effect that under the facts alleged in the complaint no action would lie against the Territory and that a like immunity exists in favor of the counties, citing *Coffield v. Territory*, 13 Haw. 478. And that though counties are liable for injury to private property in the nature of a trespass caused by negligence in repairing a highway, they are not liable for injury resulting from a mere failure to

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make repairs, citing *Matsumura v. County of Hawaii*, 19 Haw. 18 and 496.

In England it is held that though it is the duty of a county to keep its highways in repair it is not suable in damages for failure to perform the duty. 4 Dillon, Mun. Corp. (5th ed.) Sec. 1687, note. But in the United States the view was early taken, and has since been adhered to, that there is no such obligation at common law and that no action for damages caused by the neglect to repair a highway will lie against a county except by force of statute. Id. Sec. 1688; *Coffield v. Territory*, *supra*. The immunity from liability of unincorporated counties and townships—sometimes called quasi-public or quasi-municipal corporations—seems generally to have been rested upon their character, as involuntary, their duties, as governmental, and the nature of their functions as state agencies prescribed for purposes of public policy and convenience of administration. And so it has been held that such political subdivisions of the State are no more liable to civil actions for tort, as for breach of an imposed public duty, than the State itself. And the rule applies as well to cases of nonfeasance as of misfeasance. But, by the great weight of authority, municipal corporations proper are liable to an implied civil liability for damages caused to travelers for defective and unsafe streets under their control. Dillon, *supra*, Sec. 1690; 28 Cyc. 1341; *Barnes v. District of Columbia*, 91 U. S. 540, 551. In the *Matsumura* case it, therefore, became important to inquire whether the counties of this Territory should be classed as counties at common law or as municipal corporations. Mr. Justice Wilder, in his dissenting opinion, said "Counties are created for public purposes without regard to the actual wishes of their inhabitants and are in substance but agencies of the government for the purpose of aiding in

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the general administration thereof. The clothing of them with a corporate form is only done so that they may better perform their duties." 19 Haw. 36. A similar view was taken by the majority of the court in the case of *Markey v. County of Queens*, 154 N. Y. 675. But the majority of the court in the *Matsumura case*, considering the fact that in this Territory the counties are expressly created bodies corporate and politic with power to sue and liability to be sued in the corporate name, and in view of their character and functions, said, "These differences make the extension of immunity to counties in Hawaii merely a blind adherence to nomenclature in the application of an erroneous principle." 19 Haw. 34. In 6 McQuillin, Mun. Corp. Sec. 2720, the author says, "Usually cities, villages and other incorporated municipalities, have conferred upon them extensive powers in the management of their highways, streets, bridges, alleys and sidewalks, and adequate means to keep them in a reasonably safe condition for use in the usual mode by travelers; and hence, in most States, independent of statute, they are held liable to private action for special injuries resulting from defects or obstructions in the streets or sidewalks. The liability exists regardless of the size of the municipality, and applies even though the population is only a few hundred." In the *Matsumura case* the claim was for damages for injury caused to private property by the negligence of employees of the county in making repairs to a highway, and the county was held liable. That case was followed in a similar case recently decided. *Halawa Plantation v. County of Hawaii*, 22 Haw. 753. There is no difference in principle between such a case and one where, as here, the alleged negligence consisted in a failure to keep the highway in a reasonably safe condition; and the liability in this Territory of counties for misfeasance, as adjudged in the two cases referred to, in

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our opinion, settles also their liability for nonfeasance. Those cases are to be regarded as having established in this jurisdiction the rule that the liability of counties with respect to the repair and, therefore, the non-repair of highways is governed by the law applicable to municipal corporations, and that counties do not enjoy the immunity accorded to quasi-corporations.

Counsel for the defendant places considerable reliance upon the statement made by the court in the *Matsumura* case that "It is true that while given the power to maintain highways the duty of doing so is not specifically enjoined upon the defendant, and therefore that no action would lie for nonfeasance in failing to exercise this power." 19 Haw. 21. At the time that case was decided, as now, the counties had power "to open, construct, maintain and close up public streets, highways, roads, alleys, trails and bridges within its boundaries." S. L. 1905, Act 39, Sec. 9 (R. L. 1915, Sec. 1503). Then, however, all public highways were under "the general supervision, charge and control of the superintendent of public works" who was "charged with the execution of all duties relative thereto." R. L. 1905, Sec. 594. Subsequently to the decision of that case, namely, in 1913, the above mentioned duties were transferred from the territorial officer to the several boards of supervisors of the several political subdivisions of the Territory. S. L. 1913, Act 107 (R. L. 1915, Sec. 1881). Whereas there existed formerly a dual right or power to repair (see *H. R. T. & L. Co. v. Territory*, 21 Haw. 136, 144), the general charge of and control over public highways, subject to certain exceptions not material to this case, since the passage of the act of 1913, have been vested in the several counties. Under these circumstances the power to repair highways must be held to imply the duty to repair them. "By the great weight of authority it is held

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that where municipal corporations are invested with exclusive authority and control over the streets within their corporate limits and with means for their construction, improvement and repair, a duty arises to the public from the nature of the powers granted to keep the streets in a reasonably safe condition for the ordinary use to which they are subjected and a corresponding liability exists to respond in damages to those injured by a neglect to perform the duty." 28 Cyc. 1341; *Evanston v. Gunn*, 99 U. S. 660, 667; *District of Columbia v. Woodbury*, 136 U. S. 450, 456. The fact that in this Territory the counties have no independent power of taxation, their revenues being obtained almost entirely under territorial statutes and through officers of the Territory, does not alter the situation. The supreme court in *District of Columbia v. Woodbury*, *supra*, said, "It is suggested that the District is without the means to perform the supposed neglected duty; that none of its officers can pay a judgment against it, and that no process against it could enforce payment; that even a mandamus against it to levy a tax would be futile because neither the District nor the Commissioners can levy a tax for any purpose; and that no judgment against it can be paid except by warrant upon the Treasury, pursuant to an appropriation by Congress. We do not perceive that these considerations materially affect the principle upon which the decision in the *Barnes Case* rests." 136 U. S. 456.

It may seem to be going rather far to hold the county liable for injury caused by the failure to repair a defect in a country road when, perhaps, the freshet which caused the defect may have done great damage entailing heavy expenditures for the making of repairs, but on the other hand it would seem that the county, promptly and at inconsiderable expense, might ordinarily take measures to

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warn travelers of the existence of a defect in the road and to protect them from the danger of injury. At any rate, if it is deemed advisable to limit or qualify the liability of the counties in this class of cases the remedy lies with the legislature.

The only argument advanced in support of the contention that the demurrer ought to have been sustained being found untenable, the decision overruling the demurrer is sustained.

The defendant's exception is overruled.

D. H. Case (*E. Vincent* with him on the brief) for plaintiff.

E. R. Bevins, County Attorney of Maui, for defendant.

TERRITORY *v.* JAMES LOW.

No. 898.

RESERVED QUESTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

ARGUED JANUARY 4, 1916.

DECIDED JANUARY 11, 1916.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF QUARLES, J., ABSENT.

APPEAL AND ERROR—*reserved questions.*

A question may be reserved by a circuit court of its own motion, notwithstanding a motion for a reservation has been interposed by one of the parties, the court not having ruled on the question.

CRIMINAL LAW—*accessory after the fact—brother of felon.*

A brother of one convicted of the crime of burglary in the

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second degree, which is punishable by imprisonment at hard labor for a term of not more than ten years, is not punishable as an accessory after the fact to that offense under Sec. 3675, R. L. 1915.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Watson, J., dissenting.)

The indictment in this case charged that one William Low did, on the 15th day of October, 1914, at Hilo, in the county of Hawaii, commit the crime of burglary in the second degree, and that the defendant, James Low, on the 24th day of October, at Hilo, aforesaid, "well knowing the said William Low to have done and committed the crime of burglary aforesaid, in the manner and form aforesaid, him, the said William Low, did then and there knowingly harbor, conceal, maintain and assist with the intent that he, the said William Low, should avoid and escape from detection, arrest, trial and punishment as to the crime of burglary aforesaid, and that the said James Low was then and there and thereby an accessory after the fact to the crime of burglary aforesaid, contrary to the form of the statute in such case made and provided." The defendant entered a plea of not guilty and the trial proceeded before a jury. At the close of the case for the prosecution the defendant also rested his case and moved the court to direct the jury to return a verdict of acquittal. The motion was based upon the grounds that the evidence did not show that the defendant had harbored, concealed, maintained or assisted the said William Low within the meaning of the indictment or the statute, and that as the evidence did show that the defendant is the brother by consanguinity of William Low he could not be convicted under the indictment. The prosecuting attorney moved that the questions involved in the motion for a directed verdict be reserved for the con-

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sideration of this court. The circuit court then did reserve for the determination of this court the questions, (1) whether the facts submitted to the jury constituted the defendant an accessory after the fact to the crime of burglary as alleged, and (2) whether the motion to direct a verdict in favor of the defendant should be granted.

Counsel for the defendant contends that this Court should return the questions unanswered because they should not have been reserved since a question ought not to be reserved by a court of its own motion under R. L. 1915, Sec. 2511, unless the court has a well founded doubt as to it (*Territory v. Scully*, 22 Haw. 484), and the record in this case shows that the court was about to rule on the defendant's motion when the motion was made that the questions be reserved; also that a circuit court may not reserve a question upon the motion of a party under R. L. 1915, Sec. 2512, unless on account of some opinion, direction, instruction, ruling or order made or entered in the cause, and the record shows that in this case the defendant's motion had not been ruled upon. This contention is not sustained. The fact that a motion has been made, supposedly under section 2512, that a question be reserved for the consideration of the supreme court does not preclude the circuit court from making the reservation of its own motion, under section 2511, without ruling upon the question. Nor can this court presume from the fact that shortly before reserving the question the circuit court "was about to decide" the question that at the time the question was reserved the court did not entertain a well founded doubt as to it. Argument of counsel or further reflection by the court may have raised the doubt. "The statute is broad, and authority to reserve is discretionary with the trial court." *Territory v. Scully, supra*.

In view of our conclusion with reference to the second

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question, involving the construction of the statute relating to accessories after the fact, we shall pass by the first question reserved as well as the incidental one whether the evidence before the jury permitted of more than one inference and hence did not present a pure question of law such as may properly be reserved.

The point whether by reason of the fact that the defendant is a brother of the person who committed the burglary he cannot be held as an accessory after the fact to that crime turns upon the meaning of section 3675 of the Revised Laws which reads as follows:

"If any one, not standing in the relation of husband or wife, parent or child, brother or sister, by consanguinity or affinity, to any person guilty, either as principal or accessory before the fact, of any offense punishable by death or imprisonment for life, shall harbor, conceal, maintain or assist such person, with the intent that such person shall avoid or escape from detection, arrest, trial or punishment, he shall be deemed an accessory after the fact to such offense; and shall be punished, where punishment for his offense is not otherwise expressly provided, by imprisonment at hard labor not more than ten years, or by fine not exceeding two thousand dollars.

"Whoever is accessory after the fact to any other offense punishable by imprisonment for five years or more, shall be punished, where punishment is not otherwise provided by law, by imprisonment at hard labor not more than two years, or by fine not exceeding five hundred dollars."

The punishment prescribed for burglary in the second degree is imprisonment at hard labor for not more than ten years.

At common law one was an accessory after the fact who, knowing a felony to have been committed, received, relieved, comforted or assisted the felon. The law applied to all felonies and married women only were exempted from its operation where the husband was the principal offender. It will be observed that the provisions of the above quoted

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statute differ from the common law in several particulars. The precise point in the case at bar is whether the exemption of brothers and the other specified relatives as set forth in the first paragraph of the section with reference to offenses punishable by death or imprisonment for life applies also to the second paragraph with reference to offenses punishable by imprisonment for five years or more. Counsel for the prosecution contend that the exemptions specified in the first paragraph do not apply to the second, and that "the legislature apparently took the humane ground that any person standing in the near relation to any person liable to punishment by death or imprisonment for life ought not to be held guilty of being an accessory after the fact merely because his natural instincts would prompt him to shelter the principal from the terrible consequences of the crime, while in other offenses the motive could not be so potent." On the other hand, as suggested by counsel for the defendant, it is difficult to suppose that the legislature intended that the shielding by relatives of persons guilty of the most heinous crimes is to be overlooked while as to lesser crimes it is to be punished. We think the reasonable and proper view to be taken of the matter is that the exemptions were intended to apply to the second paragraph of the section. In the first paragraph the legislature evidently intended to define the offense of accessory after the fact and, we think, the words "husband or wife, parent or child, brother or sister," though referred to as "exemptions," should be regarded as embraced in the definition of the offense as are the words "harbor, conceal, maintain or assist." This being so it follows that the phrase "accessory after the fact" in the second paragraph of the section means accessory after the fact as defined in the first paragraph. We hold that a brother of one guilty of the offense of burglary in the second degree is not punishable

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as an accessory after the fact to that offense.

The second reserved question is answered in the affirmative, and the case is remanded to the circuit court.

C. S. Carlsmith, Deputy Attorney General (*W. H. Beers*, County Attorney, and *S. S. Rolph*, Deputy County Attorney, of Hawaii, with him on the brief), for the Territory.

W. H. Smith for defendant.

DISSENTING OPINION OF WATSON, J.

I respectfully dissent from the views of the majority as expressed in the foregoing opinion touching the construction of section 3675 of the Revised Laws of 1915, and the conclusion arrived at by them, in answering the second reserved question, that a brother of one guilty of the offense of burglary in the second degree is not (by reason of such relationship) punishable as an accessory after the fact. As I read the statute (Sec. 3675) provision is made therein for the punishment of accessories after the fact in two distinct classes of felonies: (1) in cases where the principal felon is guilty, either as principal or accessory before the fact, of any offense punishable by death or imprisonment for life; (2) in cases where the principal felon is guilty, either as principal or accessory before the fact, of any other offense punishable by imprisonment for five years or more. The definition of "accessory after the fact" is the same in either class of case, that is, one who harbors, conceals, maintains or assists the principal felon "with the intent that such person shall avoid or escape from detection, arrest, trial or punishment." In my opinion the words in the first paragraph, "not standing in the relation of husband or wife, parent or child, brother or sister, by consanguinity or affinity," form no part of the definition of the offense, as they are in no wise descriptive thereof, but should be construed merely as an exception exempting from punishment

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persons standing in the enumerated relationships in cases where the offense of the principal or accessory before the fact is punishable with death or life imprisonment. "An exception in a statute excludes from the purview a person or thing included in the words." *Territory v. Tan Yick*, 22 Haw. 773. To my mind it is peculiarly significant that no such exemption is contained in the second paragraph of the section, relating to offenses punishable by imprisonment for five years or more, but there it is provided that "*whoever* is accessory after the fact," etc.; and whatever may have been the motive of the legislature in exempting accessories after the fact in the one class of cases and failing to exempt them in the other, I think there can be no question as to the power of the legislature to make the distinction.

In my opinion the second reserved question, in so far as it involves the point of defendant's exemption by reason of his relationship to the person who committed the burglary, should be answered in the negative. The first reserved question, as well as other points which might arise in connection with the second question, which the majority have not found it necessary to discuss, embrace both law and fact and should be returned unanswered. *The People v. Edwards*, 5 Mich. 21.

Syllabus.

WILBUR M. KENNEDY v. MARY L. SNIFFEN,
ADMINISTRATRIX OF THE ESTATE OF
HENRY KAMANA SNIFFEN.

No. 881.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED JANUARY 12, 1916.

DECIDED JANUARY 15, 1916.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE
WHITNEY, IN PLACE OF QUARLES, J., ABSENT.

PARENT AND CHILD—*liability of adoptive father for support of abandoned child.*

An adoptive father who has abandoned his child may be held liable upon an implied contract to one who has furnished the child with necessary support, for the value thereof not in excess of what is reasonable considering the child's station in life.

EXECUTORS AND ADMINISTRATORS—*statute of non-claim—waiver.*

The statute of non-claim constitutes a special regulation of probate law; it cannot be waived; and need not be specially pleaded.

APPEAL AND ERROR—*necessity of raising question in trial court—exception to rule.*

In a jury-waived case against an administratrix, under a general exception to the decision, the defendant may raise for the first time in the supreme court a point that she could not have waived, namely, that the plaintiff had failed to prove that the claim sued on had been rejected and action thereon commenced within two months as required by statute.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiff brought an action in the circuit court against the defendant as administratrix of the estate of her deceased husband, Sniffen, claiming the sum of

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\$1290.80, being at the rate of \$25 per month, for the support of the adopted minor daughter of the decedent, who, it was alleged, had been abandoned by the adoptive father. There were two counts in the plaintiff's complaint, the second of which alleged an express contract between the plaintiff and the decedent for the support of the child, but the allegation was not sustained by proof. In the first count it was alleged that the child was adopted by Sniffen and his then wife on the 21st day of April, 1899, and that by the articles of adoption the adoptive parents agreed to clothe, maintain, educate and provide for the child in every respect as becomes the duty of a parent, but that on or about the 24th day of August, 1909, the adoptive mother having died, the decedent abandoned the child, refused to permit her to live in his home, and refused to otherwise provide her with board, lodging, clothing or education, whereby plaintiff was compelled to and did take the child into his own home and support her, the reasonable value of the board, lodging, clothing, care and maintenance so furnished by him being the sum of twenty-five dollars per month. The decedent died on December 13, 1913.

The circuit court, jury waived, held that the plaintiff was entitled to recover and gave judgment for the amount claimed. The court intimated that the amount of the claim was excessive, but felt constrained, in the absence of any contrary evidence, to hold as it did. The decision cannot be said to be unsupported by the evidence. The only exceptions relied on by the defendant are those going to the denial of a motion for nonsuit, and to the decision and judgment. The motion for a nonsuit was based upon the ground that no contractual relation had been shown to exist between the plaintiff and the decedent. It is contended that the evidence not only failed to show an express contract under the second count of the complaint, but did

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not tend to prove any facts to sustain a finding of an implied contract under the first count. There was testimony to the effect that the child was a natural one and had been given in adoption when about nine months old by the mother who afterwards became the wife of the plaintiff; that on the 24th day of August, 1909, the child then being about eleven years old, the adoptive father having married another wife, he sent the child back to her mother and told the mother, in effect, that if she would take the child he would pay for her support, and this being agreed upon the child was taken to live at the home of the plaintiff and his wife; that almost immediately thereafter the decedent repudiated the understanding and informed Mrs. Kennedy that he would have nothing more to do with the child, and he refused to contribute to her support; and that the child has since been cared for and supported by the plaintiff. The allegation of the complaint that the decedent had abandoned the child was therefore substantially proven.

Section 1288 of the Civil Code of 1859 (now R. L. 1915, Sec. 2993) provided that "The children of a valid marriage shall be denominated legitimate, and the husband of said marriage shall be liable for their support in all respects, until they severally attain the age of majority, when his liability shall cease for further provision." Such was the obligation assumed by Sniffen when he adopted the child in question, "for by the very terms of the agreement this obligation would be cast on the adopting parent." *Mokuhia v. McCandless*, 5 Haw. 370. "That it is the duty of parents to support and maintain their children is well established; and although there has been some difference of opinion as to whether in the absence of statute, there is a legal or merely a moral obligation, the better view undoubtedly is that the obligation is a legal one. At the present time the duty is very generally

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expressly imposed by statute, and under such statute is necessarily a legal one." 29 Cyc. 1605, 1606. And, "It is a necessary consequence of the duty to support the child that the parent may in a proper case be held liable for necessities furnished to the child by a third person; but in order to hold the parent liable there must be either an express promise to pay or circumstances from which a promise can be implied, some clear and palpable omission of duty on the part of the parent in not furnishing necessities to the child or some special exigency rendering the interference of such person reasonable and proper." *Id.* 1608, 1609. In the case at bar the evidence disclosed a clear neglect on the part of the decedent in refusing further to support the child and virtually abandoning her, which gave the plaintiff who did furnish the support a right of action upon the promise of the decedent, implied by law, to pay therefor. The defendant's motion for a nonsuit was properly denied. Board, lodging, clothing and the expenses incidental to the education of the child were necessities, and for the value thereof, not in excess of what was reasonable for the child considering her station in life, a claim could be made against the estate, and though the amount of the claim in this case would seem to be rather large, the trial court, as above stated, felt obliged upon the evidence adduced to award the whole sum, and the amount of the award is not now the subject of review. There was testimony in the case tending to show that for a period of apparently some months prior to the death of Sniffen the child was in a boarding school at the expense of some charitable society, during which time the plaintiff was at expense for clothing only, but no point in that connection has been raised under the exceptions.

Under the exceptions to the decision and judgment counsel for the defendant raise the point that the plaintiff

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failed to prove that he had presented his claim to the administratrix within six months from the date of the notice to creditors, and that the claim had been rejected and action brought thereon within two months thereafter as required by statute. R. L. 1915, Secs. 2493, 2495. The record does not show that this point was raised in the court below, and it is admitted that it was not raised there. Counsel for the plaintiff contends that the point may not be raised for the first time in this court. The defendant made no motion for judgment, nor for a new trial, and the exception to the decision was a general one. In *McCandless v. Honolulu Plantation Co.*, 19 Haw. 239, 242, quoted with approval in *Ripley & Davis v. Kapiolani Estate*, 22 Haw. 507, 509, it was held that such an exception in a jury-waived case is too general to bring to this court a question of law which has not been called to the attention of the court below. This is in accordance with the well settled general rule that questions not properly reserved for review in the trial court will not be noticed on appeal. See 3 C. J. 689. There are some exceptions to the rule, one being that since the reason for the rule is to give an opportunity to avoid the effect of an objection, the rule does not apply where that could not have been done even though the point had seasonably been raised. 3 C. J. 740. In *Territory v. Puahi*, 18 Haw. 649, 655, the court noted that certain evidence could readily have been supplied had the objection been raised at the trial. New points, within the scope of the exception, may be presented. In *Kalaeokekoi v. Wailuku Sug. Co.*, 18 Haw. 380, 385, the appellant, at the suggestion of the court, urged a new ground in support of his exception to the granting of a nonsuit. And in *Godfrey v. Rowland*, 17 Haw. 577, 585, the appellee was permitted to present a new ground in support of the judgment, the opposite party not having been misled at the trial by reason of the omission to there assert the point.

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In the case at bar the plaintiff was not induced to withhold evidence because of the conduct of the defendant, and it does not clearly appear whether the plaintiff was able to prove that the claim was duly presented to the administratrix and that the action was brought upon its rejection within the time allowed by the statute. If the plaintiff is able to make the proof he will have an opportunity to do so upon another trial, while if he is unable to do so he is not entitled to recover, and ought not to complain at the reversal of the judgment. The rule as to the necessity of raising a question in the trial court cannot well be applied where the point is one which the party may not waive. Such is the case here. That the claim was rejected and action thereon commenced within two months were material facts to be alleged and proved in order to establish the plaintiff's right to recover. The defendant's omission to demur to the complaint because of the lack of such allegations did not do away with the necessity of the plaintiff's proving the facts. In the case of *Defries v. Cartwright*, 10 Haw. 249, it was held that the statute of non-claim constitutes a special regulation of probate law which imposes the loss of the claim if the party fails to sue on it within the time prescribed; that the defendant need not specially plead it as a statute of limitation; and that it is a matter which the executor or administrator cannot waive. See to the same effect, *Whitmire v. Powell*, 117 S. W. (Tex.) 433; *Carney v. Hawkins*, 83 Atl. (R. I.) 327; *Nagle v. Ball*, 13 So. (Miss.) 929; *Fitzgerald v. Bank*, 64 Neb. 260. We hold that as the administratrix could not waive the point she should be permitted to raise it in this court for the first time under her general exception to the decision. We further hold that the point is well taken and that the exception must be sustained.

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A new trial is granted and the case is remanded to the circuit court.

Lorrin Andrews for plaintiff.

R. J. O'Brien (*E. C. Peters* with him on the brief) for defendant.

TERRITORY v. WILLIE MEYER AND KAMOHAI.

No. 890.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

ARGUED JANUARY 3, 1916.

DECIDED JANUARY 27, 1916.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF QUARLES, J., ABSENT.

LARCENY—*opinion evidence—weight of cattle.*

The weight of an animal alleged to have been stolen may be properly shown by a witness who had seen the same and who from his practical experience could testify to the weight.

SAME—*value—competency of witness.*

If a person shows that his business is such that by commercial reports, newspapers or other means of like nature he is familiar with the market prices of an article, and his recollection of such prices is independent of such market reports, newspapers or his books, the same need not be put in evidence, but the witness may testify the result of his examinations as he might the result of inquiries in the market places.

EVIDENCE—*failure to produce—inference.*

Where material evidence is equally available to both parties, a failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances.

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OPINION OF THE COURT BY WATSON, J.

The plaintiffs in error were convicted by a jury under an indictment which charged that they, together with one Haimende, alias Jaime Mendez, on the 12th day of April, 1914, "did unlawfully and feloniously steal, take and carry away certain thing of marketable, saleable and available value, to wit, one steer of the aggregate value of sixty dollars, the same then and there belonging to and being the property of W. H. Shipman, and did then and there and thereby commit the crime of larceny in the first degree." By section 3918 R. L. 1915 larceny is defined as follows:

"Larceny or theft is the feloniously taking any thing of marketable, saleable, assignable or available value, belonging to or being the property of another."

Section 3932 R. L. 1915 provides as follows:

"Larceny is of two degrees, first and second. Larceny of the property of the value of more than fifty dollars is in the first degree, and shall be punished by imprisonment at hard labor not more than ten years.

"All other larceny is in the second degree, and shall be punished by imprisonment at hard labor not more than one year, or by fine not exceeding one thousand dollars."

A *nolle prosequi* having been entered by the prosecution as to the defendant Haimende the case proceeded to trial against the remaining defendants (plaintiffs in error herein). At the first trial of the action the jury failed to agree on a verdict and a mistrial was entered. At the second trial the jury found both of the defendants (plaintiffs in error herein) guilty as charged in the indictment. At the trial there was evidence tending to prove that the defendant Meyer is the son of a butcher living at Waipunalei, North Hilo; that he was the man in charge of a small ranch which adjoins the Parker ranch on one side and the Shipman ranch on the other; that Kamohai was a cowboy in the employ of Meyer for some years; that on Sunday,

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April 12, 1914, the defendant Meyer ordered Haimende, a Porto Rican, also employed by Meyer, to go with him and Kamohai; when the three got to a place about eleven miles mauka of the government road Kamohai took down the five-wire fence which formed a partition between the two places; Meyer then went on to the Shipman land and attempted to rope a fat steer belonging to Shipman, but being unsuccessful called to Kamohai who caught the steer; these two took the animal on to the Meyer land, where it became disabled by breaking its leg; the fence was restored to its original condition, and night coming on the three went to the Meyer ranch house; the following morning at about nine o'clock the three returned to the scene for the purpose of butchering the animal; while there one of Shipman's employees came down the fence and Kamohai and Haimende ran away and Meyer secreted himself behind a bush near at hand; his dog remained near him, and this, together with the horses which the defendants were riding, gave the clue which was followed up and led to the discovery of the three; Meyer and Kamohai, shortly after their arrest, both made written statements to the arresting officer admitting the taking of the steer and indicating no defense; these written statements were offered and received in evidence without objection on the part of the defendants; after making his written statement Meyer was asked by the deputy sheriff why he went to the Shipman ranch and took the steer and he flippantly said that he wanted to get a good fat steer; after the indictment for larceny in the first degree had been presented there was a mistrial; in the meantime Meyer, while awaiting trial on this indictment, stole another Shipman steer and was convicted and had served his sentence. At the trial of the present case Meyer and Kamohai admitted the taking of the animal, but claimed that in doing so they were of the opinion that the animal belonged to one

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Suerra, whose cattle Meyer had the right to take; in other words, that the taking was a mistake. This was the principal, if not the only, defense on the merits. There was ample evidence to warrant the jury in finding that the taking was a felonious one, and by their verdict they found against the mistake theory. The defendants made an effort to convince the jury that the stolen animal was of the value of less than \$50, the effort being for the purpose of reducing the grade of the crime to that of second degree. Practically all of the assignments of error relate to the value of the stolen animal.

Dr. Shutte, a veterinary surgeon in charge of the Shipman ranch as manager, who had had many years experience as a rancher in the cattle raising business, gave it as his opinion that the animal would weigh 550 pounds dressed. The owner, W. H. Shipman, was able to estimate the weight of the animal from the hide and statement of its condition. Mr. Shipman was admitted by counsel for the defendants to be an expert in the cattle ranching business. He gave the weight as being 550 to 555 pounds. It appeared from the evidence that the price of dressed beef is determined by the Honolulu market and that beef at the time of the larceny was 10½c per pound in Honolulu; generally there is a difference of one-half to one cent per pound at Hilo, the point of shipment. At the time of the larceny, however, it appeared from the evidence of Mr. Shipman that the price was the same (10½c). Mr. Shipman testified that the cost of driving the animal to Hilo would be about \$1.25, and that the loss in weight, resulting from the driving, would be 25 or 30 pounds; that by deducting the cost of driving the animal to Hilo and the loss of weight the dressed beef of this animal would be worth (at the point where it was taken from the Shipman ranch) between \$55 and \$60. The defendant Meyer gave his estimate of the weight of the animal as being 450 pounds

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dressed weight; that it was "pretty fat." He further testified that the value of fat beef at Waipunalei was 9c per pound.

Perhaps the principal assignment relied on by the plaintiffs in error in this court, and the only one orally argued, is (No. 9) that the circuit court erred in overruling defendant's motion to strike the testimony of W. H. Shipman relating to a certain hide which he saw at the police station at Hilo, it being the contention of the defendants that the hide testified to by Mr. Shipman was not sufficiently identified as the hide of the animal alleged to have been stolen. It appears from the transcript that Mr. Shipman, when called as a witness for the prosecution, testified on his direct examination that shortly after the steer was taken, "It may have been two weeks or less, a week, perhaps," he saw the hide of the animal at the sheriff's office in Hilo. Counsel for the prosecution, as appears by the record, then made the statement that he intended to call other witnesses "for the purpose of tracing the hide right down." The witness then being asked as to the condition of the hide at the time he saw it, objection was made by counsel for the defense on the ground that the evidence was incompetent, irrelevant and immaterial. The objection was overruled, the court stating "Upon counsel's agreement to connect it may be admitted." The witness then testified that the hide was red with a little sprinkle of brindle on the back; that it bore the Puuoo brand (the brand used by the witness on his ranch) as described in the testimony theretofore given by Dr. Shutte and illustrated by the witness Shutte on the blackboard in the presence of the jury; that the brand on the hide at the time he saw it was "plain enough;" that from an examination of the hide in its then condition he was able, from his experience as a rancher, to tell pretty well the weight of the animal, but

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not its age; that the weight of the animal was somewhere from 550 to 555 pounds dressed weight.

The description of the hide given by the witness tallied fairly well with that given by another witness for the prosecution (Inaga), who testified that the animal alleged to have been the subject of this larceny "was what the natives called moo-o, dark brown, brindle." The undisputed evidence shows that the hide of the animal alleged to have been stolen was taken away by the employees of Shipman and turned over to the police of the city of Hilo. This condition of the evidence was recognized by the defendants in their requested instruction (No. 5b), in which the court was asked to instruct the jury, *inter alia*, "that the undisputed evidence in this case shows that the hide of the said steer was taken away by the employees of W. H. Shipman, the owner of the said steer, and afterwards turned over to the police of the city of Hilo, and that the said hide was in the possession of the police until within a few days before the present trial of this cause." Subsequent to the testimony given by the witness Shipman, Dr. Shutte, on being recalled as a witness for the prosecution, testified that the hide of the animal alleged to have been stolen was salted and taken to Hilo, and that he pointed out that hide to Mr. Shipman. There was no denial of the fact that the hide testified to by Mr. Shipman was that of the stolen animal, and the evidence nowhere raises any doubt concerning it.

We think the contention of the defendants, that the hide testified to by the witness Shipman was not sufficiently identified, is without merit, and that the motion to strike his testimony was properly overruled.

Assignments 1 and 2 complain of the rulings of the trial court that Dr. Shutte, the manager of the ranch, was competent to estimate the weight of the steer. This witness had seen the animal after it was roped and its leg broken

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by the defendants. He testified that the animal was about thirty months old, was fat, and that its dressed weight would be about 550 pounds. The witness had been manager of the Shipman ranch for about eight years, was a veterinary surgeon by profession, and had had experience in handling beef and milk cattle since 1899. He testified that he was in the habit of estimating the weight of animals by looking at them; that all experienced cattle men could do that; that cattle were usually shipped from the Shipman ranch in lots of 75 or 80 to Honolulu and that the shipments to Hilo varied in number; that he kept a record of the average weights on each shipment and that he could correctly estimate the weight of an animal within fifteen or twenty pounds. This evidence was properly admitted. As was said by the supreme court of Massachusetts in the case of *Carpenter v. Wait*, 11 Cush. 257, 258:

"The fact of the weight of the cattle might be shown by the opinion of witnesses, who had seen the same, and who, from their practical experience could testify to their weight. This species of evidence would, of course, be much inferior to that derived from the actual weighing of the cattle, but in the absence of that, it would be an approximation to the actual weight, proper for the consideration of the jury."

The experiential capacity of the witness, as testified to by him, was in our opinion, ample to qualify him to give opinion evidence as to the weight of the steer. *Pacific Mill Co. v. Enterprise Mill Co.*, 16 Haw. 282; Wigmore on Evidence, Sec. 559, et seq.

The third assignment is to the refusal of the court to permit the defendants, on their cross-examination of the witness Shipman, who had testified on direct examination that the price of beef was determined by the Hawaiian Meat Company of Honolulu, to go into the relations of that company and the various ranches on Hawaii. The

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witness having testified that he had no general agreement with the Hawaiian Meat Company touching the price of beef, evidence as to whether or not the ranchers on the Island of Hawaii were members of the Hawaiian Meat Company was properly excluded, upon the objection of the prosecution that such evidence was immaterial.

Other assignments go to the action of the trial court in refusing to require the witness Shipman to produce his books and records showing the price of beef for the month of April, 1914. This witness had testified on his direct examination that he had been in the cattle business for 38 or 39 years; that he had a place of business, a market at Hilo, where he was then engaged in selling beef at wholesale only; that years ago he used to sell at retail; that he kept track of prices both at Honolulu and Hilo; that from his own knowledge of the Hilo market, and from the prices he got and kept run of in Honolulu, the market price at the time the animal was taken was 10½c per pound, and that its value was 10½c per pound; that generally there is a difference of from one-half cent to one cent per pound in the Honolulu and Hilo prices, but at that time there was no difference; that as the animal stood on the land at Honohina, before it was roped and its leg broken, it was worth between \$55 and \$60; that he gained his information as to market values at Honolulu from reports and from market quotations in Honolulu newspapers. He testified that his information relative to the market price of beef during the month of April, 1914, was obtained from general sources, in the regular course of business, and from quotations given in the market reports contained in the newspapers; that he had an independent recollection, without reference to any books or papers, as to the market price of beef in Hilo and Honolulu in April, 1914; that the price in both places was 10½c per pound. In this state of the evidence the court ruled: "It appearing that the witness'

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recollection now is not based upon his books, the motion to produce is denied." The ruling of the trial court was in our opinion correct, and is sustained by the authorities.

"Value in a business sense consists largely of the opinions of persons familiar with the market, and these opinions are largely made up of what is said and reported by others. Hence, if a person shows that his business is such that, by commercial reports or other means of a like nature, he is familiar with the current market prices of an article, he is competent to testify on the subject, although he may not have actual personal knowledge of any particular sales. *Brackett v. Edgerton*, 14 Minn. 174, (Gil. 134;) Whart. Ev. §§ 255, 449." *Horsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476.

"That case does not require that the newspapers themselves should be put in evidence, but it recognizes them as a proper source of information, to which persons interested in the markets may resort; and there is no reason why they should not testify the result of their examinations, as they might the result of inquiries in the market places." *Cleveland & Toledo R. R. Co. v. Perkins*, 17 Mich. 296, 300. See also *Smith v. R. Co.*, 68 N. C. 107, 116; *Sirrinc v. Briggs*, 31 Mich. 443, 446.

The defendants complain of the action of the trial court in refusing to give their requested instruction No. 5b, reading as follows:

"Upon the question of the brand or brands which the steer alleged to have been stolen bore you are instructed that the undisputed evidence in this case shows that the hide of the said steer was taken away by the employees of W. H. Shipman, the owner of the said steer, and afterwards turned over to the police of the city of Hilo, and that the said hide was in the possession of the police until within a few days before the present trial of this cause. In this connection you are charged that the hide itself would be evidence of the brand or brands which it bore & the clearness or lack of clearness of the same and the failure of the prosecution to produce the same for your inspection, unless the failure to do so has been satisfactorily explained to you, gives rise to the natural inference that

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the prosecution fears to produce the said hide for your inspection, and this fear is some evidence that the hide, if produced, would have exposed facts unfavorable to the prosecution. The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its production would be unfavorable to the party's cause;" and to the giving by the court of an instruction as follows:

"The hide in this case is in the possession of the prosecution, but it is equally available for evidential purposes to the prosecution and defense. You may take into account its non-production, together with the explanation as to why it was not produced, and you may infer, if the explanation is not satisfactory, or if there is no explanation, that the prosecution feared to produce it or that the defense feared to produce it, as the facts proved may warrant."

The undisputed evidence showed, and it was apparently conceded at the trial, that the hide of the animal alleged to have been stolen was in the possession of the police of the city of Hilo, where the trial took place, and that it was equally available for evidentiary purposes to the prosecution and defense. The evidence of the witnesses for the prosecution (Shipman and Shutte), which was received without objection, was that the Shipman brand on the hide was plain, while the defendant Meyer, in support of his claim that he took the animal under the mistaken belief that it was one of the Suerra steers, which he had the right to take, testified that the brand was not very plain and was covered with long hair so that one could just see it. The hide itself was not produced, the only explanation offered for its non-production being the testimony of one of the witnesses for the prosecution that it was so putrefied that its production in court would be offensive to the court and jury. The testimony of the witnesses for the prosecution as to the condition of the brand was not objected to on the ground that such testimony

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was not the best evidence, nor upon any ground, nor was there any notice to produce given. Defendants' requested instruction was properly refused, as, if any inference could be properly drawn by the jury from the non-production of the hide, the inference was equally available against either party, as it appears from the record that the evidence was accessible to both.

The correctness of the instruction as given presents a question of more difficulty, as the general rule is that no inference is allowable where the evidence in question is equally available to both parties. *Indemnity Co. v. Perkins* (Ark.), 98 S. W. 709, 710; 22 A. & E. Ency. Law (2d Ed.) 1262; *Cross v. Ry. Co.*, 69 Mich. 363, 369. This rule, however, does not appear to be an absolute one, many courts of high standing having declined to adopt or strictly enforce it. In *Harriman v. R. Co.*, 173 Mass. 28, 53 N. E. 156, the supreme court of Massachusetts held that the inference to be drawn from the failure to call a witness available to both parties should be left to the jury upon all the circumstances; in *Mitchell v. R. Co.*, 68 N. H. 96, 117, 34 Atl. 674, it was held that either party was entitled to argue as to the inference deducible from the failure to call witnesses available to both. Professor Wigmore, in his excellent work on evidence, Sec. 288, says: "The more logical view is that the failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances." We think this view the correct one, and applying it to the case at bar the instruction given by the court was free from error. The jury were not instructed that they were bound to draw an inference unfavorable either to the prosecution or the defendants from the failure to produce this particular evidence, nor was the weight to be given to the circumstance made the subject of sug-

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gestion to the jury (*United States v. Schindler*, 10 Fed. 552).

Bearing in mind the fact that both the prosecution and the defense had introduced testimony (secondary evidence, it may be, but not objected to,) as to the condition of the brand on the hide, and that this was a material fact then in issue, if the production of the hide before the jury would have aided either party such party would probably have produced it. The jury were properly instructed as to the burden of proof, and that a taking by mistake under a *bona fide* claim of right would not constitute larceny. Reading the charge as a whole we are of the opinion that under the facts in this case the giving of the instruction complained of was not error.

The remaining assignment goes to the action of the trial court in overruling defendants' motion for a new trial. This assignment is disposed of by what has been already said.

The judgment of the circuit court is affirmed.

Harry Irwin (*T. E. M. Osorio* with him on the brief) for plaintiffs in error.

C. S. Carlsmith (*W. H. Beers*, County Attorney of Hawaii, and *S. S. Rolph*, Deputy County Attorney of Hawaii, with him on the brief) for the Territory.

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TERRITORY v. ANTONIO DELA CRUZ PALAI.

No. 874.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

ARGUED JANUARY 4, 1916.

DECIDED FEBRUARY 1, 1916.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF QUARLES, J., ABSENT.

WORDS AND PHRASES—“unlawfully.”

The words “unlawful” and “unlawfully” are commonly used as meaning “without authority of law” or “not permitted by law.”

CRIMINAL LAW—*explosives—injury to property.*

In a prosecution under section 4028, R. L. 1915, charging the unlawful use of dynamite with intent to injure or destroy property, it is not necessary to allege or prove that the property was actually injured.

SAME—*evidence—specific intent.*

The burden is on the prosecution to prove that an act charged to have been done with a specific intent was done with that intent. But it is sufficient in such cases to prove facts from which such intent may be inferred.

STATUTES—*penal laws—construction—intention.*

The mere fact that the language used in a penal statute is open to two constructions, one of which would include the acts charged and the other not, does not require that the latter view must necessarily prevail, and the former view will be adopted if the court is well satisfied that such was the sufficiently expressed intention of the legislature.

APPEAL AND ERROR—*objections to evidence—exceptions.*

An exception to the admission of evidence, to be available in an appellate court, should point out the particular part of the evidence which was objected to. If any of the evidence was admissible, a general objection is not sufficient.

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TRIAL—*instructions—motive.*

Evidence of motive, or lack of motive, being a matter properly to be considered by the jury in a criminal case, an appropriately framed instruction on the point, if requested, should be given. The instruction requested in this case was properly refused because incomplete and misleading.

SAME—*extra judicial statements—restriction of relevant evidence.*

The operation of evidence of an extra judicial statement relevant on the question of motive will not be limited by an instruction where the evidence went in generally and without objection.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant was convicted upon an indictment under R. L. 1915, Sec. 4028, charging that on the 1st day of April, 1915, in the district of South Hilo, county of Hawaii, he did unlawfully use dynamite with intent to injure, destroy and damage a certain sugar mill, the property of the Onomea Sugar Company, and brings the case to this court upon exceptions. After the case was submitted counsel were asked to file briefs upon a point which had not been presented, namely, whether in a case of this kind it is incumbent upon the prosecution to allege and prove actual injury to property as a result of the unlawful use of the explosive. The indictment, it will be observed, alleged the unlawful use of dynamite with intent to injure the property, and the evidence adduced at the trial showed that there had been no explosion and that no actual damage had been done to the mill in question. Section 4028 provides that "Any person unlawfully using dynamite or other explosive chemical or substance for the purpose of inflicting bodily injury upon, or to terrify and frighten, any person, or to injure or destroy any property, or damage the same in any manner, shall be liable," etc.

Counsel for the defendant contends that so far as this case is concerned it is as though the statute read "Any person unlawfully using dynamite to injure, destroy or damage

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any property," etc., and that as at the time the statute was first enacted (June 15, 1893) the only unlawful use of dynamite was its use in committing malicious injury, actual injury must be shown, and that the word "unlawfully" as used in section 4028 was not intended as a prohibition of the acts therein mentioned. He also argues that the fact that in the revision of 1905, and again in the revision of 1915, the provisions of the act of 1893 were included in the same chapter with the provisions relating to the offense of malicious injury adds force to his contention; that even if the words "for the purpose," as used in section 4028, are the equivalent of "with the intent" they are not grammatically connected with the words "to injure or destroy any property;" and, further, that a use of dynamite *with intent to injure* property is not a *use to injure* it.

It is not necessary, in order to give the statute a proper meaning and operation, that the acts mentioned in it should be made unlawful by another statute. "A statute often speaks as plainly by inference, and by means of the purpose which underlies the enactment, as in any other manner, and whenever it appears by necessary inference from what is expressed, that a given act or acts are opposed to the policy of the law, and will defeat its purpose, or the object had in view by the legislature, such acts should be held to be thereby prohibited." *U. S. v. O'Connor*, 31 Fed. 449, 451. The words "unlawful" and "unlawfully," where the context or object of a statute requires, may be given a restricted meaning and construed as having reference only to acts expressly prohibited by statute, but such restricted meaning is by no means a necessary one for those words are commonly used in a wider sense, as the equivalent of "without authority of law" or "not permitted by law," and as inclusive of actionable violations of civil rights whether or not they be punishable criminally as well. *State v. Tinkler*, 72 Kan. 262; *People v. Loveless*, 84 N. Y. S. 1114; *Com. v.*

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Hunt, 4 Met. 111, 123; *State v. Savant*, 115 La. 226; *Terrell v. State*, 86 Tenn. 523, 531; *Martens v. Reilly*, 109 Wis. 464, 473; *Surles v. Sweeney*, 11 Ore. 21, 24. The statute as passed in 1893 was entitled "An act relating to the unlawful use or possession of explosives," and it had no apparent relation to the offense of malicious injury. In the Penal Laws of 1897 the two statutes were widely separated, and the fact that in the revisions of 1905 and 1915 they were incorporated in one chapter should not affect the construction. In other words, the provisions of sections 4028 to 4031 of the Revised Laws mean now just what they did when they were first enacted. Upon a strict grammatical construction, probably, the words "for the purpose" in section 4028 would be held to be connected only with "inflicting bodily injury" upon persons, but the strict rules of grammar should not be permitted to defeat the legislative intent. The words "purpose" and "intent," according to the dictionaries, are synonyms. And see *Smith v. State*, 70 Tenn. 614, 619; *Phillips v. State*, 45 S. W. (Tex.) 709; *Perugi v. State*, 104 Wis. 230, 242; *Anderson v. Hooks*, 9 Ala. 704, 709. And we take the view that section 4028 was regarded by the legislature as providing that any person unlawfully using dynamite or other explosive chemical or substance for the purpose of injuring or destroying (or with the intent to injure or destroy) any property, should be punished as provided. The placing of such explosive in position for the purpose of injuring or with the intent to injure, another's property would constitute an unlawful use within the meaning of the statute though there be no explosion and no actual damage done. We think this view does not transgress the rule that penal statutes are to be construed strictly, nor the rule that the intent of the legislature is to be gathered primarily from the words used in the act. If the language used in a penal statute is susceptible of two equally probable meanings that interpretation

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which operates in favor of life or liberty will be preferred, but the mere fact that the language used is open to two constructions, one of which would include the acts charged and the other not, does not require that the latter view must necessarily prevail, and the former view will be adopted if the court is well satisfied that such was the sufficiently expressed intention of the legislature. *U. S. v. Hartwell*, 6 Wall. 385, 396; *U. S. v. Reese*, 92 U. S. 214, 219; *U. S. v. Harris*, 177 U. S. 305, 309; *Northern Securities Co. v. U. S.*, 193 U. S. 197, 358. "While it is true that before a case can be held to fall within a penal statute, the case must come within the letter and spirit of the statute, yet if it comes within the spirit, and also within one reasonable interpretation of the letter, of the statute, it is sufficient, although there may be a literal construction that might be put upon the statute which would not include the case." *U. S. v. Williams*, 159 Fed. 310, 313; *U. S. v. Hocking Valley R. Co.*, 194 Fed. 232, 243. The act of 1893 was enacted at a time of political turmoil. It penalized the possession of explosives with the intent to use the same unlawfully as well as the unlawful use thereof, and we believe that a different form of expression would have been used if the intention of the law makers had been to condemn the unlawful use of explosives against property only when actual damage ensues.

Under exceptions to the denial of a motion for a directed verdict of acquittal and to the verdict rendered counsel for the defendant contends that the *corpus delicti* was not proven by more than a scintilla of evidence. There was testimony from which the jury were authorized to find that at about six o'clock on the morning of April 1, 1915, at the mill of the Onomea Sugar Company, a bundle was found traveling on the cane carrier leading from the end of the flume by which cane is sent in from the fields and the crusher in the mill; that it was seen and taken out from

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near the rollers by an employee whose post of duty was at that point; and that on examination it was found to be a gunny bag tied up with wire and containing, besides a few stones, two sticks of dynamite with explosive caps and fuse attached wrapped in a newspaper and two paper bags and tied with string. The claim that there was no substantial evidence to support a finding that the bag contained dynamite and that it was used with the intent to injure property is not sustained. There was direct testimony that the substance was dynamite. The intent with which an act is done may be inferred from the nature of the act and the circumstances surrounding it. From the evidence in the case the jury were at liberty to find that someone had placed the dynamite in the flume leading to the mill with the intent and expectation that it would reach the mill, be exploded by concussion, and damage the property. "The burden is on the state to prove, by either direct or circumstantial evidence, that the act was done with the requisite specific intent. But it is sufficient in such cases to prove facts from which the specific intent may be inferred." 12 Cyc. 153. See *Lo Toon v. Territory*, 16 Haw. 351; *Malone v. State*, 169 Ind. 72; *Talbert v. State*, 25 So. (Ala.) 690. There was ample evidence from which the jury could have found, as they did find, that the *corpus delicti*, the act done with the specific intent, was established. Nor can we sustain the contention of counsel that the verdict was against the evidence in that it did not connect the defendant with the commission of the act. We deem it unnecessary to prolong this opinion with a review of the evidence of the circumstances relied on by the prosecution. True, the connecting evidence was circumstantial, but it was supported by testimony tending to show motive on the defendant's part—dissatisfaction and ill-will toward the company and its manager—and also by testimony as to a conversation between the defendant and his wife overheard at the jail after

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his arrest in the course of which he said to her, "Keep quiet. Talk easy. They can't prove it. You always say it was a plain paper. That is alright, we want them to put (send) us back to our country." We have read the transcript of testimony carefully, and find that the evidence was sufficient to sustain the verdict.

An exception was taken to a ruling made by the trial court by which Mr. Moir, the manager of the company, was permitted to testify to what was said in a conversation had between himself and the defendant, who is a Portuguese, on the day prior to the commission of the alleged offense. It appeared that the conversation was had in part directly in the English language and in part through an interpreter who spoke both the English and Portuguese languages. Mr. Moir testified that the defendant seemed to understand what he, Moir, said to him, and there was other testimony tending to show that the defendant has some knowledge of English. The defendant himself gave his version of the conversation, and he did not claim to understand no English. The interpreter also testified as to the conversation. The three versions varied somewhat. A part, at least, of Moir's statement as to the conversation was clearly admissible, and as the objection was a general one, interposed to his testifying to it at all, and there was no motion to strike any part of it, we cannot say error was committed. "As a rule objections to evidence, to be available on appeal, must point out the particular part of the evidence which is objected to. If any of the evidence was admissible, a general objection is not sufficient." 3 C. J. 818.

Another exception was taken to the refusal of the court to give an instruction (No. 9) on behalf of the defendant to the effect that in a prosecution depending upon circumstantial evidence, in order that the accused may be convicted, the evidence must exclude every reasonable hypothesis of innocence. This point was correctly covered by

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the charge given by the court and there was no need of repeating it in the form requested by the defense which, perhaps, was a shade too strong.

Another exception was taken to the refusal of the court to give defendant's requested instruction No. 10, as follows: "The jury are instructed that if they should find that the evidence fails to show sufficient motive to commit the crime charged, on the part of the accused, this is a circumstance in favor of his innocence. In this case, therefore, if the jury find upon careful examination of the evidence that it fails to show sufficient motive on the part of the accused to commit the crime charged against him, then this is a circumstance which the jury may consider in connection with all the other evidence in the case in making up their verdict." Counsel for the prosecution contend that the instruction was properly refused because it was "argumentative," and "an instruction upon a question of fact," also that the subject of motive was sufficiently covered in the charge of the court. The only reference in the charge, however, to motive was that its existence was asserted on one side and denied on the other. We think the instruction was not argumentative, nor a comment upon the character, quality or strength of the evidence within the meaning of the statute. R. L. 1915, Sec. 2435. But we are of the opinion that the instruction, in the form requested, was incomplete and misleading, and was properly refused on that account. Evidence of motive or lack of motive for the commission of a crime is generally admissible on the trial of criminal cases and is a proper subject for consideration by the jury, though proof of motive forms no part of the burden devolving on the prosecution in making out a case. It being a proper matter for the jury to consider, it would seem to follow that an appropriately framed instruction on the point, if requested, ought to be given. In cases depending on circumstantial

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evidence motive, or the absence thereof, becomes important on the point whether the criminal act in question was committed by the defendant. But the lack of evidence of motive becomes unimportant if the jury are satisfied from the evidence beyond a reasonable doubt of the guilt of the accused, and an instruction on the subject of motive which omits this phase is apt to be misleading, for in such case a motive may be inferred from the fact of the commission of the crime.

Another exception relates to the ruling of the court in refusing to give defendant's requested instruction No. 11, to the effect that a certain statement testified on rebuttal to having been made by the defendant after his arrest tending to show ill-will against Mr. Moir should be considered by the jury only as bearing on the credibility of the defendant as a witness and not generally on the question of his guilt or innocence. The defendant had admitted making the statement but denied that it had reference to Mr. Moir. The testimony went in without objection so that no question as to its non-admissibility on the ground of remoteness is presented. The testimony being before the jury under these circumstances we think its effect was not to be limited as stated in the refused instruction. "As the relevancy of the extrajudicial statement is dependent upon that of the mental state, the probative utterance may precede, accompany, or follow the principal fact, if any, which the mental state assists to characterize or explain. So long as the time of the declaration is not too remote to be relevant, a considerable interval will not be treated as fatal to admissibility." 4 Chamberlayne, Ev., Sec. 2656. Aside from any question of admissibility, then, the testimony was of a character proper for consideration by the jury in connection with the other evidence tending to show motive.

The charge of the court to the jury covered the case fairly and correctly.

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All the exceptions have been considered, and they are overruled.

C. S. Carlsmith, Deputy Attorney General (*W. H. Beers*, County Attorney of Hawaii, and *S. S. Rolph*, Deputy County Attorney of Hawaii, with him on the brief), for the Territory.

J. W. Russell for defendant.

EMMA FORSYTH RUMSEY *v.* NEW YORK LIFE
INSURANCE COMPANY, A CORPORATION,
AND BENSON, SMITH & COMPANY, LIMITED,
A CORPORATION.

Nos. 893 and 896.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED FEBRUARY 7, 1916.

DECIDED FEBRUARY 16, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—pleading—misjoinder of parties—multifariousness.

A bill in equity is not demurrable for misjoinder of parties respondent or multifariousness where the complainant claims but one general right, and there is a single subject-matter in which both respondents are interested, though the interests are distinct and different species of relief is asked against each of them.

APPEAL AND ERROR—reserved question—question returned unanswered.

Where the question reserved is whether a demurrer to a bill in equity should be sustained, and the facts are not fully and clearly set out in the bill, the matters are complicated, and the bill is amendable and probably would be amended in case the demurrer were sustained, this court is not required to answer the question, but may, in the exercise of its discretion, return it to the judge who reserved it.

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OPINION OF THE COURT BY ROBERTSON, C.J.

The bill in this case sets forth, in substance, that the complainant is the widow of one Samuel L. Rumsey, formerly a resident of this Territory, whom she married on August 31, 1905, and who died in California on the 27th day of July, 1910; that the respondent, the New York Life Insurance Company, is a New York corporation having the right to do a life insurance business in this Territory; that the respondent, Benson, Smith & Company, Limited, is a Hawaiian corporation engaged in the business of buying, selling, dealing in and manufacturing drugs, medicines and other commodities; that on the 11th day of June, 1903, the insurance company issued a policy upon the life of said Rumsey, wherein it was stipulated that "New York Life Insurance Company agrees to pay five thousand dollars to the firm of Benson, Smith & Co., Ltd., or its legal representatives, or to such beneficiary as may have been duly designated, at the home office of the company, in the City of New York, immediately upon receipt and approval of proofs of the death of Samuel L. Rumsey, the insured, of Honolulu, in the Island of Oahu, Hawaii. * * * The insured, having reserved the right, may change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by written notice to the company at the home office, provided this policy is not then assigned. The insured may at any time, by written notice to the company at the home office, declare any beneficiary then named to be an absolute beneficiary under this policy. No designation, or change of beneficiary or declaration of an absolute beneficiary shall take effect until endorsed on this policy by the company at the home office. During the lifetime of an absolute beneficiary, the right to revoke or change the interest of that beneficiary will not exist in the insured. If any beneficiary or absolute beneficiary dies before the insured the interest of such beneficiary will become payable

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to the executors, administrators or assigns of the insured;" that at the time of the issuance of said policy the said Rumsey was the treasurer of said Benson, Smith & Company, Limited, and, by reason of that connection, the policy passed into and remained in the physical possession of the corporation; that in January, 1904, Rumsey, in impaired health, left the Territory of Hawaii, and in February, 1905, he was displaced from office in the corporation, and never thereafter resumed such office or returned to this Territory; that on the 10th day of July, 1907, said Rumsey notified the insurance company, upon a blank form furnished him for the purpose, that he changed the beneficiary of said policy from Benson, Smith & Company to Emma Forsyth Rumsey; that said written notice was immediately delivered to the company at its home office; that in August, 1907, and at divers times thereafter, both the complainant and her husband notified Benson, Smith & Company not to pay any further premiums upon said policy, that the beneficiary under the policy had been changed and the complainant designated as such beneficiary pursuant to the right of the insured, that no right except the right to be repaid the premiums paid by it would be recognized in Benson, Smith & Company, the amount of which said Rumsey duly offered to pay, and demand was thereupon made by Rumsey upon Benson, Smith & Company that it deliver said policy to him; that said respondent failed and refused to deliver said policy; that said change of designation of beneficiary was never endorsed upon said policy solely because of the refusal of Benson, Smith & Company to deliver up said policy; that the failure to have such endorsement made was not through any fault of said complainant or her husband; and that on the 15th day of August, 1910, the complainant presented to the insurance company at its home office proofs of death of said Rumsey upon blank forms furnished by the company for the purpose and in accordance with the terms

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of the policy, but said company refused and still refuses to pay the complainant the sum due upon the policy. There are other averments in the bill which, counsel for the complainant contends, show that Benson, Smith & Company had no insurable interest in the life of said Rumsey, or, if such interest did exist at the time of the issuance of the policy, it terminated when Rumsey ceased to be an officer of the corporation; that the insurance company is estopped to deny the complainant's claim; and that Benson, Smith & Company has no legal or equitable claim in the premises beyond the right to be repaid the amount of the premiums paid by it. Counsel for the respondents contend that the averments contained in the bill, and proper inferences to be drawn therefrom, show that the policy was taken out pursuant to a valid agreement entered into between Rumsey and Benson, Smith & Company under the terms of which that corporation obtained a vested interest as the sole beneficiary under the policy and an absolute right to the proceeds thereof upon the death of the insured. The prayer of the bill is to the effect that the policy in question be reformed by declaring the complainant to be the beneficiary thereunder; that said Benson, Smith & Company, Limited, be declared to be the trustee for the complainant of said policy, and that it deliver up the same upon being repaid the amount of the premiums paid by it; that the New York Life Insurance Company be decreed to pay to the complainant the sum of five thousand dollars, with interest from July 27, 1910; and for general relief. The respondents demurred separately to the bill generally and specially, and the circuit judge, sitting in equity, reserved for this court the question whether the demurrers should be sustained. In view of the uncertainty in the averments of the bill as to the circumstances under which the issuance of the policy was obtained, leading to a dispute between respective counsel as to what the facts, as disclosed by the bill were, we

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think we ought not, in this proceeding, to pass upon the general demurrers setting up a lack of equity in the bill. Should the demurrers be sustained on that ground alone the bill might be amended so as to remove the existing uncertainty, and this court, upon a reserved question, should not be required to deal with a demurrer to an amendable bill as though it were the court of original jurisdiction. Nor shall we pass upon the question of laches since, if the demurrer should be sustained on that ground, the complainant might be able to show, by amendment, a valid reason or excuse for the delay. We shall therefore consider only whether there has been a misjoinder of parties respondent, and whether the bill is multifarious.

On behalf of the respondents it is contended that the bill shows that the causes of complaint against the respective respondents are entirely separate and distinct, that it does not appear that the insurance company was in any way a party to the retention of possession of the policy by Benson, Smith & Company, that the facts that would support an action against the latter to recover possession of the policy are in no manner connected with such facts as would support a suit against the former for reformation of the policy and recovery of the insurance money, and that, therefore, there has been a misjoinder of parties, and that the bill is multifarious because of the improper inclusion of distinct and independent matters. From the standpoint of the complainant she is entitled to recover the insurance money, but in order to get into a position to do so she must secure the substitution of herself as beneficiary by endorsement on the policy, and in order to obtain such endorsement she must get possession of the policy. We think the respondents were properly joined upon the principle that in equity all persons interested in the subject matter of the suit and its result should be made parties. Each of them is interested in the subject matter, i. e., the insurance money, the one to

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pay it to the party rightfully entitled to it, and the other to receive it as against the complainant. For the same reason we think the bill is not multifarious. The application of the rule as to multifariousness is influenced very largely by the circumstances of cases as they present themselves. *Gov't. v. Tramways Co.*, 7 Haw. 683. In the case at bar there is an obvious connection between the alleged rights of the complainant against each of these respondents, and their presence in the one suit is necessary to the determination of the whole controversy and in order that the complainant may obtain, if she be entitled thereto, the full relief sought. The presence of both claimants of the insurance money in the one suit would seem to be advantageous to the insurance company in that the court would thereby be enabled to determine to which of them rather than the other the money should be paid, and the joinder of the insurance company would not, so far as appears, embarrass Benson, Smith & Company in making its defense, or inconvenience the court in hearing and deciding the case. Counsel for the complainant points out that the complainant brought an action upon this policy in Colorado and that judgment of nonsuit was there entered against her. *Rumsey v. N. Y. Life Ins. Co.*, 147 Pac. 337. The court there said, "It is urged that the insured in good faith attempted to secure the policy in order to have the change of beneficiary indorsed as provided therein, but was wrongfully denied possession by Benson, Smith & Co., and thereby prevented from so doing by circumstances over which he had no control, for which reason equity should step in and treat the substitution as complete. To sustain this contention, we would have to hold that the policy had been wrongfully withheld from the insured by Benson, Smith & Co., and for that reason the substitution should be treated as complete. This includes a finding that in equity Benson, Smith & Co. had ceased to be the beneficiary, and this without their

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being made a party to the action. It stands admitted by the pleadings that the policy is in their possession, and that they were and are designated in it as the beneficiary. Under such circumstances, we do not think that their equities in the matter, and their right as a beneficiary, can be determined under the equitable rule of substitution in an action to which they are not a party." Those observations support our view that there was no misjoinder of parties in this case. If there was no such misjoinder the bill can hardly be said to be multifarious for the relief asked was appropriate to the circumstances. "It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others." *Brown v. Guarantee Trust Co.*, 128 U. S. 403, 412. "A bill is not multifarious where one general right only is claimed by the bill though the defendants may have separate and distinct interests therein." *Castle Estate v. Haneberg*, 20 Haw. 123, 130. A bill between proper parties involving a single subject matter is not multifarious because it prays for different species of relief which might be the subject of separate suits. *Ohera v. Ackerman*, 9 Haw. 597; *Carter v. Lane*, 18 Haw. 10, 12.

We are not disposed to further consider the matter at this time. There seems to be a growing tendency, by means of interlocutory appeals and bills of exceptions, and reserved questions, to try causes by piecemeal. Such methods of review are authorized by statute and they may be pursued at times with advantage to litigants and courts, but they are discretionary methods and the trial judges should exercise their discretion with respect to them conservatively and with discrimination. The statute (R. L. 1915, Sec. 2512) provides that "The supreme court may, in its discretion, return any reserved question for decision in the first instance by the circuit court or judge." When, as in

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this case, the reserved question is whether a demurrer to a bill in equity should be sustained and the points involved are complicated and the facts are not as fully and clearly set forth as they might be made to appear, and the bill would probably be amended should the demurrer be sustained, we hold that this court ought not to be expected to answer the question, but should return it for decision by the judge who reserved the question.

We, therefore, return the question reserved in this case unanswered except to the extent above set forth.

Lorrin Andrews for complainant.

F. W. Milverton (*Thompson, Milverton & Cathcart* on the brief) for N. Y. Life Ins. Co.

P. R. Bartlett (*Holmes & Olson* with him on the brief) for Benson, Smith & Co., Ltd.

IN THE MATTER OF THE WILL OF POLLY KALUA,
DECEASED.

No. 887.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED FEBRUARY 3, 1916.

DECIDED FEBRUARY 19, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

WILLS—undue influence—evidence.

Where in the contest of a will the only evidence tending to show undue influence was testimony that the attorney who, acting under the instructions of testatrix, drew the will was a member and trustee of a church organization which was named as one of the beneficiaries in the will; and that such attorney, having him-

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self first declined the request of testatrix that he act as executor and trustee under the will, suggested the name of a trust company to act in that capacity, which suggestion was adopted and acted upon by the testatrix, the evidence wholly fails to show any undue influence with respect to the making of the will and was insufficient to submit the issue to the jury.

WILLS—contest—trial by jury—directing verdict.

Upon the trial in the circuit court upon appeal from a judge sitting as a court of probate in the matter of the probate of a contested will, the contestant is entitled to have the issues tried by a jury, but the court may in proceedings of this sort, where the facts of the case require it, direct a verdict.

OPINION OF THE COURT BY WATSON, J.

The defendant in error, Hawaiian Trust Company, Limited, named as executor and trustee in the will of Polly Kalua, deceased, made application to a judge of the second circuit court for the probate of said will. This petition was resisted by the widower and heir at law of the deceased (plaintiff in error here) on the grounds, as stated in his written "protest against the admission to probate," "That said instrument is not, and never was, in fact, or in law, the last will and testament of said Polly Kalua, and that the same does not, and never did, represent the true wishes and desires of said Polly Kalua in the premises; and that the same, if in fact signed or executed, published or declared by said Polly Kalua as and for her last will and testament (which this protestant hereby denies) then said instrument was so signed, executed, published and declared by her in ignorance of the contents and effect thereof; and that the signature to the execution, publication and declaration of said instrument as and for her last will and testament, if in fact made by said Polly Kalua (which such protestant hereby denies), was and were done and made as the result of improper and undue influence brought to bear upon her before and at the time of the execution, signature, publication or declaration thereof." After a hearing the circuit judge granted the prayer of the petition and the will was

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admitted to probate. An appeal was taken to the circuit court and a jury trial was demanded and allowed. At the close of the contestant's case the proponent moved the court to direct a verdict in its favor. This motion was granted and a verdict was rendered as directed.

The main question now raised by contestant's assignments of error is whether there was sufficient evidence to go to the jury. Assuming in the contestant's favor that the somewhat vague protest filed by him properly raised the issues of execution, testamentary capacity, and undue influence, and that these issues were involved in the trial of the case in the circuit court, a careful reading of the evidence satisfies us that there is no testimony upon which by the utmost stretch of the imagination an argument can be based to sustain the charge that the instrument was not duly executed, or that the testatrix was not in the full possession of her mental faculties. Those features of the case are therefore eliminated.

Turning now to the testimony relied on by plaintiff in error to show undue influence, it comes from one witness, Mr. D. H. Case, the attorney who drew the will and who was one of the subscribing witnesses thereto. The will in controversy was executed on May 2, 1912, and is as follows:

"I, Polly Kalua, of Wailuku, County of Maui, Territory of Hawaii, wife of J. W. Kalua, declare this to be my last will and testament, and hereby expressly revoke all other wills by me heretofore made.

"I designate and appoint the Hawaiian Trust Company, Limited, a domestic corporation, with its principal office in the City and County of Honolulu, executor and trustee of this my will; said executor and trustee to give such bond, file such inventory or inventories, and render such accounts, as may from time to time be required by the court having jurisdiction of my estate and the trust created hereby.

"I give and bequeath all of my property of whatsoever nature and wheresoever situate, and of which I may die seized and possessed, either in my own name or in the name

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of another in trust for me, unto my husband, J. W. Kalua, for and during his natural life *only*; he, my husband, during such period of time, to have the sole use and benefit of all rents, issues and profits, from time to time, during his life, accruing and growing out of said properties, first deducting therefrom all expenses having to do with the upkeep of said properties, the payment of taxes, water rates, interest on incumbrances existing and outstanding at the time of my death, as well as commissions that may from time to time become payable to the executor and trustee.

"After my husband's death my property shall descend as follows:

"One Thousand Dollars (\$1,000.00) to the Hawaiian Trust Company, Limited, the domestic corporation hereinabove named as trustee. The interest derived from this One Thousand Dollars so held in trust, over and above such commissions as may by law be allowed the trustee, shall be expended by said trustee in caring for and keeping in good order that plot of ground in the Wailuku cemetery in the town of Wailuku, County of Maui, Territory of Hawaii, commonly known as the Kalua family burial ground, this being the same ground wherein our daughter Agnes is laid to rest.

"All of the balance of my property, after the death of my husband, over and above said one thousand dollars hereinabove placed in trust, shall descend to and be inherited absolutely by—

"(1) The Kaahumanu Church of Wailuku (native), a domestic corporation; and

"(2) The Wailuku Union Church (foreign), also a domestic corporation; said corporations to take said property share and share alike.

"In Witness Whereof I have hereunto set my hand this 2nd day of May, 1912.

"Polly Kalua.

"Signed by Polly Kalua, and declared by her to be her last will and testament, in the presence of us, who, at her request, and in her presence, and in the presence of each other, have hereto subscribed our names as witnesses this second day of May, 1912.

"Enos Vincent.

"Marie G. Vincent.

"Daniel H. Case."

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Mr. Case, who is a member of the bar of this court, when called as a witness for the proponent, testified in substance as follows: That he had known the deceased for many years; that he was generally familiar with her property, having acted as agent for Mr. W. R. Castle, who held a mortgage on testatrix' property, in the matter of collecting rents, etc.; that he was not Mrs. Kalua's confidential adviser and had never acted as her attorney in any matter in court; that Mrs. Kalua came to his office two or three days, possibly longer, before the execution of the will, and said she wished to make her will; that he (the witness) took a pencil and piece of paper and put down her name and the data which she then gave him; that he said to her, "To whom do you wish to leave your property?"; that testatrix said, "I want to give it to my husband for life;" that after his death she wished it to go to the two churches, naming them and further identifying them by reference to the pastors and the locations of such churches respectively. Witness then called the attention of the testatrix to the fact that she should make some provision for an executor, whereupon testatrix requested the witness to act in that capacity. This the witness declined to do, telling her that if she did not name any one the court would do so after her death when the matter of her will came up, at the same time calling to her attention the fact that it was quite common to have trust companies serve as executors and administrators. Witness testified that he then spoke of the Hawaiian Trust Company and was not sure whether he spoke of any other companies or not. Testatrix then said, "I will have that company serve as my executor," and directed that the witness, in drawing the will, make provision for one thousand dollars to be kept by the Hawaiian Trust Company, the interest of which to go towards keeping up the graves in their family burying lot. Witness testified that he asked the testatrix if she had any brothers or sisters or other

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relatives whom she wished to remember, but testatrix said she had not; that Mrs. Kalua spoke English fluently and read that language easily; that several days later, when Mrs. Kalua returned to his office to execute the instrument, he had the will drawn up and submitted it to her; that she read it to herself, having it in her possession about ten minutes, and afterwards he read it to her; that witnesses were then called in, one the stenographer in Mr. Case's office and the other an attorney with whom Mr. Case was associated in a business way, and on their arrival he stated to them in the presence of Mrs. Kalua, "Mrs. Kalua had me call you over here as she wished you to sign her will as witnesses;" that when he finished reading the instrument to her he asked Mrs. Kalua in the presence of the other subscribing witnesses, "Is this your last will and testament," and she said, "Yes;" that thereafter she executed the will in the presence of the witnesses, who thereupon signed their names in her presence and in the presence of each other as subscribing witnesses. On cross-examination Mr. Case testified that he was a member and trustee of the Wailuku Union Church at the time of the execution of the will.

There is not a syllable of testimony, not a hint, that Mr. Case or any other person requested or suggested any disposition of the property. All that was done was done at the instance and upon the request of the testatrix. The contestant called no witnesses as to testatrix' mental condition. So far from the testimony tending to show mental weakness, it was uncontradicted that testatrix was a woman of sound mentality, much interested in church work and in charitable projects. The contestant himself testified that the testatrix was a member of the Kaahumanu Church, one of the beneficiaries named in the will; that she had been a delegate to church conventions on several occasions and that she had once discussed with him leaving her property

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to the Hawaiian Board. He further testified, uncontradictedly, that the property which his wife owned at the time of her death had previously been owned by him, having been bought by him, but that he had turned it over to her at a time when he was very sick, when he thought he was not going to live; that she had told him she was going to turn the property back to him; that he and his wife had lived together in harmony up to the time of her death, and that she had never told him about having made a will.

After having carefully examined the record in this case we are constrained to the conclusion that there is no testimony which would justify a submission to the jury on any issue as to testatrix' mental soundness, the execution of the will or undue influence on the part of Mr. Case or any other person. If a will is set aside upon such a flimsy showing as was here made upon any of the issues few wills can hope to stand. The power of the court, in a proper case, to direct a verdict for one party or the other is undoubted. *Will of Charles Notley*, 15 Haw. 435; *Leach v. Burr*, 188 U. S. 510; 40 Cyc. 1333. In this connection the remarks of Mr. Justice Brewer in *Beyer v. LeFevre*, 186 U. S. 114, 125, are pertinent and commend themselves to our judgment as a wholesome expression of the law that should control the action of courts in matters of this character:

"One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal courts that the will of a person found to be of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor."

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The foregoing we consider as applicable in the courts of this Territory as in the Federal courts.

A number of the assignments of error go to rulings rejecting or admitting evidence. These need not be considered in detail. The rulings were either correct or else were harmless errors in the view that we take of the case. The judgment of the court below is right and should be affirmed.

Affirmed.

Lorrin Andrews for plaintiff in error.

Frear, Prosser, Anderson & Marx for defendant in error.

HENRY T. HUGHES *v.* DANIEL P. MCGREGOR.

No. 900.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED FEBRUARY 17, 1916.

DECIDED FEBRUARY 19, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*instructions—directed verdict.*

Where there is any doubt as to the proximate cause of an injury for which damages are sought, or such injury may have resulted from one of two or more acts of negligence, the question of proximate cause should be left to the jury, and it is error in such case to instruct the jury to find for the defendant.

SAME—*same—same—new trial.*

Where there is, in an action to recover damages for an injury alleged to have been sustained by plaintiff through the negligent acts of the defendant, evidence from which the jury might find the defendant negligent as alleged, it is error to instruct the jury to find for the defendant, and where so instructed, a new trial will be granted.

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NEGLIGENCE—contributory negligence by plaintiff—last clear chance.

Although plaintiff may have been guilty of negligence that contributed to the injury of which he complains, yet, if the defendant could have avoided the injury by the use of reasonable care, it was his duty to do so, failing which duty a verdict against him is authorized.

OPINION OF THE COURT BY QUARLES, J.

This cause comes here upon writ of error. Plaintiff assigns seven errors, the first three of which relate to lengthy remarks made during the progress of the trial by the court, in the presence of the jury, which were to some extent in the nature of comment upon evidence introduced. The remaining assignments of error are to the action of the court in directing the jury to find for the defendant, to the verdict and judgment thereon, on the grounds that such direction, verdict and judgment are contrary to law, contrary to the evidence and to the weight of the evidence.

The reporter's transcript of the evidence and proceedings covers 170 pages of typewriting. The evidence, briefly summarized, shows, among other facts, the following: On the night of June 26, 1914, near the hour of midnight, two traffic officers, Chilton and Ferry, stopped an automobile (car 822), which was traveling on the mauka side of Kalakaua avenue without lights; soon afterwards these officers saw two cars (No. 600, belonging to the plaintiff, and No. 1602, belonging to the defendant) approaching rapidly on the same side of this highway, being, when first seen by said officers, about three-eighths of a mile distant; the officers ran towards the approaching cars to signal them to stop, Ferry going about 125 feet farther than Chilton; Chilton signalled plaintiff's driver, one Aylett, to stop and he did stop about eighty feet from car 822; Ferry signalled defendant to stop his car, but he did not do so, and while traveling at a rapid rate of speed, estimated by Chilton to have been from twenty-five to thirty miles per hour when it passed him, having at the time one wheel locked, ran into

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the plaintiff's car, damaging it. Ferry testified that defendant's car was traveling thirty miles or more an hour when it passed him. The evidence tends to show that the defendant was intoxicated at the time; that Kalakaua avenue is divided in the middle by a strip of parking, and on the mauka side, where the accident occurred, the traveled portion of the highway is twenty-two feet in width. There was evidence tending to show that the brake on defendant's car was not in good condition at the time and it only locked one of the hind wheels; that if the brake had been in good condition the defendant's car could have been stopped within thirty feet after applying the brake. Upon these points the evidence was conflicting. The evidence shows that at the time of the accident the makai side of Kalakaua avenue was in bad condition and travel in the direction of Waikiki was confined to that portion of the highway mauka of the parking. When the evidence on behalf of the plaintiff closed the defendant moved for a nonsuit, which was denied. The defendant testified in his own behalf, and introduced other witnesses, but before closing his case the trial court, on its own motion, directed the jury to find for the defendant.

From remarks made by the trial court during the progress of the trial the learned circuit judge seems to have been of the opinion that a number of causes contributed to and brought about the injury to plaintiff's car, that is to say: negligence of the city and county in permitting that portion of said highway makai of the parking to be in such condition that it could not be safely traveled; negligence of the officers in stopping car 822 and permitting it to remain on that portion of said highway mauka of the parking; negligence of the driver of plaintiff's car in stopping it without signalling to defendant; and negligence on the part of the defendant. Where one of two or more acts of negligence may be the proximate cause of an injury, or where there is any doubt as to the proximate cause, the

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question is to be left to the jury (*Ward v. I. I. S. N. Co.*, 22 Haw. 66; *same case*, 22 Haw. 488; *Martin v. Wilson*, *ante* p. 74). The facts and circumstances as disclosed by the evidence would have supported a finding that the defendant was guilty of negligence, which was the proximate cause of the injury. The rate of speed at which the defendant was traveling; his condition as to being drunk or sober; the attending circumstances which would have enabled a reasonably prudent man driving the defendant's car to have prevented, or to have been unable to prevent, the accident, such as the condition and width of the road, the presence or absence of light, the presence or absence of other vehicles on the highway at the time, the condition of the defendant as to being drunk or sober, the condition of his machine, his ability to stop it quickly, and the rate of speed under which he was traveling under all the circumstances at the time, all matters of fact, should have been determined by the jury under proper instructions, and it was error to direct the jury to find for the defendant.

If it be conceded for the purpose of this discussion that the driver of plaintiff's car was guilty of negligence that contributed to the injury to plaintiff's car, yet, if the jury should have found that under all of the circumstances the defendant could by reasonable care have avoided the accident it was his duty to do so, failing which a verdict against him would have been authorized (*Ferreira v. H. R. T. & L. Co.*, 16 Haw. 615; *Robinson v. H. R. T. & L. Co.*, 20 Haw. 426). The record does not disclose, as matter of law, the non-liability of the defendant.

The judgment is reversed with cost to the plaintiff in error and the cause remanded to the circuit court for further proceedings consistent with the views herein expressed.

R. J. O'Brien (*E. C. Peters* with him on the brief) for plaintiff in error.

L. L. Burr (*C. H. McBride* on the brief) for defendant in error.

Syllabus.

PHILOMENA SILVERHORN, ADMINISTRATRIX OF
THE ESTATE OF ALEXANDER McLAIN, DE-
CEASED, *v.* THE PACIFIC MUTUAL LIFE IN-
SURANCE COMPANY OF CALIFORNIA, A COR-
PORATION.

No. 891.

EXCEPTION FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED FEBRUARY 9, 1916.

DECIDED FEBRUARY 19, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LIMITATION OF ACTIONS—*statute and exceptions—contract stipulation.*

Where parties by contract stipulate that no action shall be commenced upon the contract unless commenced within a certain time, the time being reasonable for the purpose, such stipulation becomes a condition of the contract, is binding on the parties, and neither the statute of limitations nor the exceptions thereto apply.

SAME—*pleading by demurrer—insurance.*

Where it appears upon the face of the complaint in an action upon an insurance policy that the parties stipulated in the policy that the defendant, the insurer, should not be liable in an action thereon unless the same was commenced within one year from the date of the death of the insured, and the insured had been dead more than one year before the action was commenced, a demurrer to the complaint upon the ground that the action was not commenced within the stipulated time is proper and should be sustained.

PLEADING—*demurrer—waiver.*

Where defendant demurs to plaintiff's complaint on the ground that it appears therefrom that the plaintiff's cause of action is barred by contract of the parties and the trial court and the parties treat such demurrer as properly raising the question, the plaintiff, after the demurrer is sustained, should not, on appeal, for the first time, be permitted to question the right of the defendant to raise the question by demurrer but should be held to have waived the question of procedure.

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OPINION OF THE COURT BY QUARLES, J.

The plaintiff as administratrix of the estate of Alexander McLain, deceased, filed in the circuit court of the first judicial circuit her complaint in assumpsit upon a certain life insurance policy issued by the defendant to said deceased on the 15th day of May, 1903, which policy is attached to and made a part of the complaint. The complaint alleges that said insured died in June, 1907; that the plaintiff was appointed such administratrix by the circuit court of the first judicial circuit of the Territory of Hawaii August 14, 1914, and qualified as such on August 15, 1914; that in November, 1914, the plaintiff made and delivered to the defendant, on forms prescribed by the defendant, proofs of the death of said insured; that defendant failed to pay the amount of insurance named in the said policy, to plaintiff's damage in the sum of \$1000, for which plaintiff demanded judgment. To the said complaint the defendant filed a demurrer, general and special, upon the following grounds:

"First: That the complaint does not state a cause of action in favor of the plaintiff.

"Second: That the complaint on its face shows that the action is not commenced within one year of the date of the death of the insured as required by the terms of the policy which is made a part of the complaint.

"Third: That the complaint fails to allege the payment of the premiums as required by the terms of the policy."

The circuit court sustained the demurrer but granted leave to amend the complaint and made an order allowing an interlocutory exception to this court from the order sustaining the demurrer, and the cause comes here upon interlocutory exception challenging the correctness of the said order sustaining the defendant's demurrer. In our opinion the exception must be overruled.

The second ground of the demurrer was well taken and

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this dispenses with the necessity of considering the other grounds of the demurrer. Where parties to a contract stipulate that any action or suit thereon must be brought within a certain named time, and the time so stipulated is a reasonable time in which to commence the action, the stipulation becomes a condition of the contract and is binding upon both parties (*Tong Chong Chan v. The New Zealand Ins. Co.*, 13 Haw. 483, and authorities therein cited). In harmony with this ruling is the decision in the case of *Boardman v. Fireman's Fund Ins. Co.*, 14 Haw. 21, wherein it was held that a stipulation in the policy that proof of loss must be made on behalf of the insured within sixty days after loss is a condition precedent to maintaining an action on the policy. The weight of authority, and we think the better reasoning, is to the effect that where an action on an insurance policy must, by express stipulation in the policy, be brought within one year, such stipulation becomes a condition of the policy and is binding upon the parties. One year has frequently been held to be a reasonable time within which to commence such action, and that such stipulation binds the parties (*McConnell v. Iowa Mut. Aid Ass'n.*, 79 Ia. 757; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Lewis v. Metropolitan Life Ins. Co.*, 180 Mass. 317; *Metropolitan Life Ins. Co. v. Caudle* (Ga.) 50 S. E. 337; *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6; *Vincent v. Mutual Reserve Fund Life Ass'n.*, 74 Conn. 684; *Brady v. Prudential Ins. Co.*, 168 Pa. St. 645; *Riddlesbarger v. Hartford Life Ins. Co.*, 7 Wall. 386; *Wilkinson v. John Hancock Mutual Life Ins. Co.*, 27 R. I. 146).

It is argued on behalf of the plaintiff that a general exception to statutes of limitation that the statute does not run until there is some one in existence capable of bringing the action obviates the necessity of complying with the stipulation in the policy that "No suit upon said

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policy shall be sustained unless commenced within one year of the date of the death of the insured," inasmuch as the action was commenced within one year after the appointment of the plaintiff as administratrix of the estate of the deceased. This contention cannot be sustained. It is well settled that where parties by contract stipulate the time within which action or suit must be commenced thereon, and the time so stipulated is reasonable, that statutes of limitation, and the exceptions thereto, do not apply, but the rights of the parties are determined by the conditions which they have placed in the contract (*Wilkinson v. John Hancock Mut. Life Ins. Co.*, *supra*; *Brown v. Roger Williams Ins. Co.*, *supra*; *McElroy v. Continental Ins. Co.*, 48 Kans. 200; *Ward v. Penn. Fire Ins. Co.*, 33 So. 841; *Fey v. I. O. O. F. Mut. Life Ins. Soc.*, 120 Wis. 358; *Mead v. Phoenix Ins. Co.*, 64 L. R. A. 79; *Lewis v. Metropolitan Life Ins. Co.*, *supra*). In *Wilkinson v. John Hancock Mut. Life Ins. Co.*, *supra*, the court held that the action must be commenced within the time stipulated in the policy, the court saying, *inter alia*: "The object of the statute and the contract was to allow a certain time within which the suit should be brought. If the other meaning were adopted there would be practically no limitation at all. Parties interested might postpone the appointment of an administrator for many years, and the company could have no remedy. In life insurance death is a factor in every case, and the necessity of the appointment of a personal representative can hardly have been overlooked by the framers of the statute or the writers of the policy. The time allowed seems ample within which to appoint an administrator and commence suit against the insurance company." What the court there said is applicable to the case at bar. In *Metropolitan Life Ins. Co. v. Caudle*, *supra*, the insured died March 6, 1902, and his administratrix commenced an action July 13, 1903. The court held the action

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barred by the condition contained in the policy that "No suit shall be brought against the company after one year from the date of the death of the insured," citing a number of Georgia cases.

It is argued on behalf of the plaintiff that the policy in question, by its terms and conditions, had a cash value at the death of the insured and that the plaintiff is entitled to recover that cash value. This contention is based upon conditions in the policy to the effect that upon default in the payment of any premium, after payment of three or more full years' premiums, the company would issue to the insured a paid-up policy pursuant to a certain schedule on surrender of the policy, and the further stipulation that if all premiums have been paid to the end of the term specified below, this policy, if surrendered to the company while in force, or within three months thereafter, will entitle the owner to cash as follows: at the end of the tenth year, \$424; at the end of the fifteenth year, \$770; at the end of the twentieth year, \$1273. As heretofore suggested, there is no allegation in the complaint that the policy was surrendered or tendered for surrender for any of the aforesaid purposes, and the facts stated in the complaint inferentially show the annual payments for not more than four full years prior to the decease of the insured. The complaint was not framed upon the theory that the plaintiff was entitled to a paid-up policy by reason of having made three or more payments, nor upon the theory that the policy had any cash value other than the amount of insurance stipulated in the original policy. The action was upon the original policy and to recover the full amount thereon. While new arguments based upon the theory of the pleadings in the trial court may be made in an appellate court, yet changes of the theory of such pleadings are not generally favored. The supreme court of the United States in the case of *Fleitman v. Welsbach*

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Street Lighting Co., decided January 24, 1916, in an opinion by Mr. Justice Holmes, said: "It is now suggested, evidently as an afterthought since the decision in the district court, that there might be a decree directing the corporation to sue or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf. But the bill is not framed for that purpose, as the court below held."

The plaintiff in this court for the first time questions the right of the defendant to demur to the complaint on the ground that the action was not brought within time. The bar of the statute of limitations has been presented by demurrer in the following law cases that have come to this court, viz., *Castle v. Smith*, 17 Haw. 32; *Garcia v. Kekaha Sug. Co.*, 20 Haw. 170; *Kauha v. Palolo Land & Imp. Co.*, 20 Haw. 237. Under the common law practice as it originally existed the statute of limitations could only be presented by a special plea in bar, and that is the rule in some jurisdictions now where the common law practice prevails. In the code states, however, the rule is that which has been followed in the Hawaiian cases heretofore cited to the effect that when it appears affirmatively from the allegations of the complaint that plaintiff's cause of action is barred by the statute the defendant may by demurrer plead the statute. Our civil procedure act (Ch. 137 R. L.), so far as pleadings are concerned, has abolished the technical forms of common law pleadings and in actions *ex contractu*, as well as *ex delicto*, has prescribed very short forms of pleadings on behalf of the plaintiff. This act (Ch. 137, Sec. 2360 R. L.) provides as follows:

"It shall be incumbent upon every defendant served with process of summons as hereinbefore provided, within the time specified in the summons or order of publication, to file with the clerk of the court, an answer to the plaintiff's demand, either admitting all the facts stated in the petition to be true, and denying that they are sufficient in law to support the plaintiff's demand, which shall form an

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issue of law to be determined by the court, or denying the truth of the facts stated in the petition, which shall form an issue of fact to be determined by the jury."

It will thus be seen that the demurrer in question here is, within the meaning of our civil procedure act, an answer. It certainly pleads the question of limitation as created by the contract, as much so as if stated in an answer or plea. A demurrer is often treated as equivalent to a plea (*Hopkins v. Wright*, 17 Tex. 30; *Hudson v. Wheeler*, 34 Tex. 356; *Howell v. Howell*, 15 Wis. 60; *Vincent v. Mut. Reserve Fund Life Ass'n.*, 74 Conn. 684; 31 Cyc. 271). "A demurrer to a declaration cannot properly be said to be a plea to the merits, except in cases where a judgment on the demurrer in favor of defendant would be a bar to a subsequent suit on the same execution. * * * A demurrer is, however, always deemed in the nature of a plea in bar, and cannot partake of the nature of a plea in abatement, even though it assign matter in abatement as a special cause of demurrer." Cyc. *supra*.

We are of the opinion that when the complaint shows, as it does here, that the parties by contract have stipulated that the defendant shall be liable in no action which is not commenced within twelve months after the decease of the insured, and the complaint shows on its face that more than one year has elapsed since the death of the insured, the question of limitation by the terms of the contract may be presented by demurrer. But even if this be not so, the plaintiff did not object or except to this question being raised by demurrer in the court below where it appears to have been treated as properly raised, by the court and by both parties, for which reason plaintiff should not be permitted to raise the question here for the first time, but should be held to have waived the manner of raising this issue of law in the trial court. Under authorities heretofore cited it is held that neither statutes of limitation nor

Robertson, C.J., and Watson, J., concurring.

exceptions thereto apply in a case where, as here, the parties have by contract stipulated the time in which an action shall be brought upon the contract. This is an additional reason for holding that this question was properly presented by demurrer in the trial court.

The trial court properly sustained the demurrer, for which reason the exception of the plaintiff is overruled. The cost of this appeal is awarded to the defendant.

R. J. O'Brien (*E. C. Peters* with him on the brief) for plaintiff.

A. L. Castle (*Castle & Withington* on the brief) for defendant.

CONCURRING OPINION OF ROBERTSON, C.J.

I concur in the foregoing opinion except as to the ruling made that the plaintiff should not be permitted to raise for the first time in this court the point that the action was not brought within the time limited in the policy could not be raised by demurrer. The plaintiff's exception to the order sustaining the demurrer raised the question whether the ruling was right, and in presenting that exception the plaintiff ought not to be limited to the contentions made in the lower court. She should, in my opinion, be allowed to advance any ground or reason why she claimed the ruling was erroneous. That would not be raising a new question, but merely the presenting of a new point within the scope of the exception. *Kalaeokekoi v. Wailuku Sug. Co.*, 18 Haw. 380; *Kennedy v. Sniffen*, ante, p. 115.

CONCURRING OPINION OF WATSON, J.

I am of the opinion that the contract limitation contained in the policy as to the time within which suit must be brought was improperly raised in the court below by demurrer. The rule of the common law is undoubted that in an action at law the statute of limitations could not

Watson, J., concurring.

be raised by demurrer, but could only be taken advantage of by plea (25 Cyc. 1396; 13 Pl. & Pr. 200; Angell on Limitations, §285). In *Hines v. Potts*, 56 Miss. 346, 352, the court said:

"The bar of the statute of limitations cannot be availed of by a demurrer to the declaration, even though the cause of action set forth may appear to be barred. The statute of limitations must be pleaded, so that the plaintiff may, if he can, avoid the bar by replying facts which prevent it."

That the reasons for the rule are equally applicable where the limitation is by contract, see *Miller Brewing Co. v. Ins. Co.*, 111 Ia. 590, 598. As I view it, the rule in this jurisdiction has not been changed by the statutory provision referred to in the opinion of the court (Sec. 2360, R. L.). See Rule 4, circuit court first judicial circuit, which requires that "In personal actions the statute of limitations shall be specially pleaded," etc. In none of the cases referred to in the opinion of the court was the method of raising the point questioned.

It may be conceded that the rule is one of practice merely (*Wissner v. Ogden*, Fed. Cas. No. 17,914, 30 Fed. Cas. p. 392), and in my opinion the appellant, by reason of having treated the question as properly raised in the court below, should not now be permitted to raise it here for the first time (*Scott v. Kona Dev. Co.*, 21 Haw. 258, 263; *Keator Lumber Co. v. Thompson*, 144 U. S. 434; *Bank v. Telegraph Co.*, 141 Fed. 522, 4 L. R. A. N. S. 181, 186; *Schuster v. Carson*, 28 Neb. 612, 615, 616.)

I concur in the conclusion that the exception should be overruled.

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KEONAONA KALEIHEANA, SAM KEAHIPAKA
KALEIHEANA, PAINA MANASSE AND MAUNA
KALEIHEANA v. JOHN KEAHIPAKA AND
KAAEMOKU KAKULU.

No. 895.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED FEBRUARY 14, 1916.

DECIDED MARCH 1, 1916.

ROBERTSON, C. J., WATSON, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF QUARLES, J., DISQUALIFIED.

*DEEDS—conveyance of land under lease—severance of rent from re-
version.*

A deed conveying land, which is under lease, to certain grantees but containing a clause providing that the rents shall go to the children of the grantor, held not to create a trust, but a conveyance of the fee to the grantees and a grant of the rents accruing under the lease to the grantor's children. A corresponding construction placed upon another deed executed at the same time conveying other land under lease to the same grantees for life, remainder to their children and the children of the grantor, and providing for the division of the revenues between the life tenants and the grantor's children.

OPINION OF THE COURT BY ROBERTSON, C.J.

In this case the respondents seek to have reviewed a decree of a circuit judge, sitting in equity, in a suit for an accounting whereby the sum of \$1061.48 was found to be due to the complainants and ordered paid to them by the respondents. The matter had been referred to a master before whom a hearing was had, and upon his report, the respondents' objections thereto having been overruled, the decree was entered as stated.

It was shown that on the 30th day of July, 1891, one

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Kepane, who was the mother of the complainants, and the aunt of the respondents, executed two deeds of gift. They were written in the Hawaiian language and inartistically drawn. By one of them she conveyed to Laumania, Kaaemoku and John Keahipaka and "their heirs, assigns, executors, administrators and representatives forever," her one-fourth undivided interest in a parcel of land situate at Kawaihapai, Oahu, described in Royal Patent No. 343. The deed contained a clause reading, "O na loa hoolimalima nae o kahi e hooliloia nei e lilo no ia i ka'u mau keiki pono." The translation in the record makes the clause read "The rental or revenues received from said premises are to be paid over to my children," but it would more accurately be rendered "The rents however of the land now conveyed shall go to my own children." By the other deed the grantor conveyed two pieces of land at Paalaa, Oahu, being apanas 1 and 3 of Royal Patent No. 1491, to Laumania, Kaaemoku and John Keahipaka "during their natural life, and in case of their death, said premises shall descend to my children, to wit, Keonaona, Keahipaka, Keahilele, Paina and Mauna, and to the children of Laumania, Kaaemoku and John Keahipaka, and to their heirs, assigns, executors, administrators and representatives forever." This deed also provided that "the revenues derived from said premises are to be equally divided among Laumania, Kaaemoku and John Keahipaka and my children whose names are above mentioned." Keahilele, the brother of the complainants, and Laumania, the sister of the respondents, have since died.

The complainants contend that the deeds in question constituted the respondents trustees for the complainants with reference to the revenues derived from the lands, and that they were properly held jointly liable for the amount which it is contended the evidence showed the complainants to be entitled to, but which had been received and

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retained by the respondents. No further question has been raised as to the proper construction of the deeds. The respondents deny that a trust was created. They contend that the complainants' right to the rents was a legal right, though they seem to concede that if they had collected and retained more than their just shares they would have to account severally in this proceeding for the excess, their defense being that they had fully accounted to and with the complainants for all rents due them. The testimony was contradictory, and, on this writ of error, we must regard questions of fact as having been settled by the decree. R. L. 1915, Sec. 2523. The respondents contend that, in any event, their liability would not be joint, but several only for such sums as may have been unjustly retained by them respectively.

The intention of the grantor was not clearly expressed. The clauses referring to the rents or revenues were not worded precisely the same, though we think they were intended to have the same effect. No duties were imposed on the grantees with reference to the lands under either deed. The grantees were not required to make or renew leases, nor to collect and account for any rentals. We hold that no trust was created in favor of the grantor's children. The evidence showed that at the time the deeds were executed the lands—or portions of them—were under lease to other parties, and we think the language used in the deeds could have no other effect than to sever the rentals which were to accrue under those leases from the fee, granting them, under the one deed, to the grantor's children, and, under the other, to the grantor's children and the three life tenants. "The lessor may assign the rent independently of the reversion, and the assignee may recover rents to accrue in his own name." 18 A. & E. Enc. Law (2d ed.) 286. "Although the general rule is that the rent is incident to the reversion and passes with it, yet the

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lessor may sever the rent from the reversion by expressly reserving it, or he may grant the rent alone, in which case a subsequent grant of the reversion does not pass the rent." 24 Cyc. 1175. See *Silveira v. Ahlo*, 16 Haw. 702.

The evidence tended to show that the rents of the Kawaihapai land were collected by the respondent Kakulu, while those of the Paalaa land, in so far as they were not received by Kepane herself while she lived, or paid directly to the complainants, were collected by the respondent Keahipaka. Under these circumstances there could be no joint liability. The decree was erroneous, also, in holding the respondents liable to account for rents which accrued under new leases made after those existing at the time of the execution of the deeds had expired or had been terminated. Again, the master seems to have charged the respondents with one-half of the rental of the Kawaihapai land, which was owned in common, whereas the deed of Kepane purported to grant only an undivided quarter thereof. Other points have suggested themselves but as they were not presented by counsel we shall not discuss them.

On behalf of the complainants it is contended that the respondents, at the hearing, admitted their liability to account in accordance with the theory of the complainants. Whether the admission went as far as contended we need not say. The matter of the construction and legal effect of the deeds in question is for the court to determine.

The decree of the circuit judge is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

J. T. DeBolt for plaintiffs in error.

Lorrin Andrews for defendants in error.

Syllabus.

EUGENE MURPHY v. W. A. McKAY.

No. 912.

APPEAL FROM ACTING DISTRICT MAGISTRATE OF WAILUKU.

ARGUED FEBRUARY 24, 1916.

DECIDED MARCH 1, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*certificate of appeal—points of law.*

On appeal from a judgment of a district magistrate to this court the points of law upon which the appeal is taken must be stated in the district magistrate's certificate of appeal and if not so stated the appeal must be dismissed.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced this action of assumpsit in the district court of Wailuku against the defendant and obtained judgment for a small amount, from which judgment the defendant has appealed to this court on points of law. In the notice of appeal it is recited that the appeal is upon points of law, to wit: "The court erred in overruling defendant's motion for a nonsuit, said motion for nonsuit being on the following grounds" (naming four grounds for the motion) "and 2, that the court erred in taxing costs against the defendant herein." In the district magistrate's certificate of appeal, it is recited that the appeal is "on points of law," but no point of law is stated. Should the appeal be dismissed for the reason that the district magistrate's certificate does not state the points of law upon which the appeal is taken as required by Rule 14 of this court?

The statute authorizing the appeal (R. L. 2507) provides, *inter alia*, that "any appeal solely upon points of law from a decision of a district magistrate shall be so stated in the notice of appeal." Rule 14, *supra*, supple-

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menting the statute, and regulating the procedure by which such appeal is brought to this court, requires the district magistrate to send to this court "a certificate of appeal, stating the nature of the action, the decision made and the points of law upon which the appeal is taken." It is not necessary to set forth in the notice of appeal the points of law upon which the appeal is taken, but it is necessary to state in the notice of appeal that the appeal is upon points of law. The points of law must be stated in the district magistrate's certificate of appeal, and if not stated therein the appeal will be dismissed (*The King v. Lee Choy*, 7 Haw. 62; *Humuula Sheep Station v. Ahlo*, 7 Haw. 213; *Castle v. Bowler*, 8 Haw. 366; *Titcomb v. Naeole*, 10 Haw. 346). In *Territory v. Schaefer*, 19 Haw. 214, it was said at page 218: "Defendant finally urges that the ordinance was superseded or impliedly repealed by R. L. Sections 3115 and 3116, as amended by Act 68 of the Laws of 1907, following the ruling made in *Territory v. McCandless*, 18 Haw. 616, that a county has no power to prohibit by ordinance an act already made penal by territorial statute. This point of law was not stated in the certificate of appeal and consequently cannot be considered." Much liberality has been allowed in presenting the certificate of points of law to this court. For instance, in a recent case (*Yamamoto v. Sakurai*, 20 Haw. 657) it was held that the certificate stating the points of law may be filed in this court at any time before argument. This decision is not in conflict with the rule requiring the appellant to reduce the points of law upon which he takes his appeal to writing and present them to the district magistrate within the time allowed by law for perfecting his appeal as announced in *Afong v. Kale*, 7 Haw. 520 and in *Castle v. Bowler*, 8 Haw. 366. There is no impropriety in stating in the notice of appeal the points of law upon which the appeal is taken and we regard it as good practice to do so, yet such recital in the notice of appeal does not dispense with the necessity of

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stating the points of law in the district magistrate's certificate of appeal. It is only on points of law that an appeal from a judgment of a district magistrate can be brought here. The statute allowing the appeal contemplates that the appellant shall perfect his appeal, that is, do the things that he must do, in order to appeal, within ten days, and if he presents his points of law on which he appeals in writing, whether in his notice of appeal or otherwise, to the district magistrate within the time required, he has done all that he can do, but must see that the certificate of appeal states the points of law and that such certificate is before this court prior to the argument.

In *Afong v. Kale*, *supra*, the certificate of appeal did state the points of law upon which the appeal was taken, but the certificate was not filed in this court until two months after the appeal had been perfected and the record sent up. The court there made some suggestions to the effect that if the points of law appeared on the minutes of the district magistrate it was not necessary to state them in the certificate of appeal, but this was *obiter dicta* as in that case the points of law appeared in the certificate of the district magistrate, and the motion to dismiss the appeal was made upon the ground that the points of law upon which the appeal was taken were not stated in the district magistrate's certificate within ten days after judgment.

Under the liberal construction and application of the rule in question made in former decisions of this court it is hard to conceive of any valid excuse for not complying with it.

Under the decisions cited, and for the reasons herein stated, the appeal is dismissed with costs to the plaintiff appellee.

E. Murphy in proper person.

E. Vincent (*D. H. Case* with him on the brief) for defendant.

Syllabus.

TERRITORY *v.* THOMAS McVEAGH.

No. 905.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED FEBRUARY 29, 1916.

DECIDED MARCH 2, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CONSTITUTIONAL LAW—*deductions from wages of laborers.*

Sections 3446, 3447 and 3448, R. L., which make it a misdemeanor for an employer to retain or deduct any part or portion of the wages of a laborer in his employ without the written consent of such laborer; or, to collect any fine, store account, offset or counterclaim out of such wages unless by action in court and judgment therefor first obtained, do not impair the obligation of contracts, do not deprive persons of property without due process of law, do not provide for imprisonment for debt, do not deny the equal protection of the laws, and are not unconstitutional on any of said grounds.

OPINION OF THE COURT BY QUARLES, J.

The defendant was charged in the district court of Honolulu as follows:

"That said Thos. McVeagh, at Honolulu, City and County of Honolulu, Territory of Hawaii, on or about the 22nd day of May, 1915, did deduct and retain all of the wages due and payable for the week ending May 22nd, 1915, as and for the services of a certain employee, to wit, one Herbert Alexander, he, the said Herbert Alexander having been employed by him, the said Thos. McVeagh, during said week; and that said Thos. McVeagh thereby collected of and from said Herbert Alexander, a purported offset or counter-claim without the consent of him, the said Herbert Alexander, either oral or in writing, or by action in court as provided by law, and without first having

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obtained a judgment therefor as provided by law, and contrary to sections 3446-3448 inclusive, of the Revised Laws of 1915; and that said Thos. McVeagh has wilfully and persistently and maliciously refused to pay to said Herbert Alexander the said wages, though often requested so to do, and has alleged as the excuse therefor his purpose to deduct, retain and collect the alleged offset or counter-claim."

To the said charge the defendant demurred. His demurrer was overruled, and on trial he was convicted and fined \$50. From said judgment of conviction the defendant appealed to the circuit court of the first judicial circuit and there again demurred to the charge upon the following grounds:

"1. The charge does not describe any offense punishable by the laws of the Territory of Hawaii:

"2. Sections 3446, 3447, and 3448 of the Revised Laws, under which this charge is made, are contrary to the Constitution of the United States of America, and the Organic Act of the Territory of Hawaii, in that said sections:

"First: Impair the obligations of contracts,

"Second: Deprive persons of property without due process of law,

"Third: Provide for imprisonment for debt, and

"Fourth: Deny the equal protection of the laws."

The circuit court being in doubt as to the constitutionality of sections 3446, 3447 and 3448, R. L., under which the defendant is prosecuted, has reserved to this court the question "Whether said demurrer ought to be sustained by said circuit court, for any or either of the reasons or grounds of demurrer therein set forth." Heretofore we have had occasion to suggest that the statute authorizing a circuit court or judge to reserve a question to this court intended that it was only in cases of doubt in the mind of the court or judge that questions should be reserved to this court (*In re Sherwood*, 22 Haw. 385, 389; *Territory v. Scully*, 22 Haw. 484). In reserving the question aforesaid to this

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court the circuit court has signified that it has grave doubts as to the constitutionality of the statutes involved, but expressed no doubt as to what the ruling should be upon the first ground of the demurrer. In the briefs counsel have not discussed the first ground of the demurrer but have confined their arguments to the question of the constitutionality of said statutes. We will therefore refrain from expressing any opinion as to the first ground of the demurrer and will confine ourselves to a consideration of the second ground involving the constitutionality of the statutes, considering the objections to the statutes altogether and not singularly. The statutes in question are sections of the Revised Laws as follows:

"Sec. 3446. Wages, deductions from. It shall be unlawful for any person, firm, partnership or corporation, within this Territory, to deduct and retain any part or portion of any wages due and payable to any laborer or employee, or to collect any store account, offset or counter claim without the written consent of such laborer or employee or by action in court as provided by law.

"Sec. 3447. Fines, etc., deduction for. No fines, offsets or counter claims shall be collected, deducted, or retained out of any wages due and payable to any laborer or employee by any person, firm, partnership or corporation, in this Territory, unless by action in court and judgment therefor first obtained as provided by law.

"Sec. 3448. Penalty. Any person, partnership, firm or corporation who shall violate any provision of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars and not more than one hundred dollars."

No provision in these statutes impairs the obligation of any contract involved in this case. The defendant points to no contract made by him which is impaired, and to be in position to question the statute on this ground he must do so and show how he is affected by it (*Territory v. Miguel*,

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18 Haw. 402, 404, quoting from *Hatch v. Reardon*, 204 U. S. 152; *Emmeluth v. Board of Supervisors*, 19 Haw. 171, 174; *In re Craig*, 20 Haw. 483, 490). These statutes recognize the right of employers and employees to contract with each other and do not abridge or interfere with their legitimate right to contract. The defendant has not shown that he has been deprived of any property without due process of law and is not in position to question the statutes on that ground. If it be said that by prohibiting him from collecting or retaining out of the wages of his employee the amount of some counter-claim or offset that he has against such employee the statute deprives him of property without due process of law, the answer is that the statute recognizes his right to contract with his employee to retain such counter-claim or offset, failing which the statute recognizes his right to obtain a judgment against such employee but does not recognize his right to determine, by taking the law into his own hands, his own claim to which his employee does not agree and to collect the same without due process of law. The statutes were intended to protect the employee in the very rights which the defendant claims that he may be deprived of under the said statutes.

The objection to the said statutes that they "provide for imprisonment for debt" is not tenable. If the judgment of the lower court should be upheld and the defendant should fail to pay the fine assessed against him he would be imprisoned for doing that which the statute prohibits; he would not be imprisoned for debt but for the violation of a penal statute. His imprisonment would be contingent upon his paying the fine assessed against him, not contingent upon his paying the wages, if any, due to his employee.

The fourth and last objection urged against the said statutes is that they "deny the equal protection of the laws"

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and is without merit. The defendant does not appear to have been denied equal protection of the laws with others in his position or condition. The statutes under consideration do not in our opinion violate any provision of the Organic Act or of the Federal Constitution and we do not see how they can be held unconstitutional on the grounds, or any of the grounds, set forth in the demurrer. Natural liberty oftentimes must give way for the good of society. Laws prohibiting the performance of secular business on Sunday; prescribing legal rates of interest and forbidding and punishing usury; and forbidding the performance of other acts not evil in themselves, are upheld as the legitimate exercise of legislative power. A statute of Utah forbidding work in underground mines and at or around smelters for more than eight hours each day has been held to violate no provision of the Constitution (*Holden v. Hardy*, 169 U. S. 366) although it is evident that such statute abridges the right of contract. A statute making it the duty of employers who have issued store orders in payment or part payment for wages due their employees to redeem such orders in cash upon demand of a holder thereof has been held constitutional (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13; *Dayton Coal & Iron Co. v. Barton*, 183 U. S. 23) although it is apparent that such statute also abridges the right of contract. Many other instances could be given but we deem it unnecessary to pursue the subject further.

The object or purpose of the statutes under consideration is a good one and in the interest of the public and tends to prevent broils and controversies over claims asserted on the one hand and denied on the other and to protect all parties in the right to contract in the equal protection of the law and in the security of property, and so viewed these statutes are in line with the principles of the Constitution and not

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violative of such principles. They are justified by the same principle that justifies statutes exempting certain specific articles of property from execution and others which exempt the wages of a laborer for a limited time from garnishment. The principle upon which such statutes are justified is that they enable a laboring man to support himself and family so that they shall not become public charges.

Many decisions have been cited to support the contention of the defendant but we deem it unnecessary to review them. Many of them can be easily distinguished from the case at bar. Some of them support the contention of the defendant but these we regard as in conflict with the best authority and out of joint with modern legislation and judicial decision, and after a careful consideration of all of them we could find no valid objection to the constitutionality of the statutes under consideration even if the defendant is shown to be in position to raise the constitutional questions set forth in his demurrer.

We therefore advise the circuit court that in our opinion it should overrule the demurrer of the defendant to the charge on the second ground of demurrer, but express no opinion as to the merits of the first ground of demurrer, returning that portion of the question unanswered.

A. M. Brown, City and County Attorney, *A. M. Cristy*, First Deputy City and County Attorney, and *W. T. Carden*, Second Deputy City and County Attorney, for the Territory.

J. Lightfoot for defendant.

Syllabus.

T. ATAU v. GOO WAN HOY.

No. 906.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

SUBMITTED MARCH 2, 1916.

DECIDED MARCH 13, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

REPLEVIN—*possession—trespass.*

Where one takes forcible possession of his own goods he may be liable in trespass but not in replevin.

SALES—*conditional sale—title—performance.*

In a conditional sale title to the property remains in the vendor until the vendee has paid the purchase price or made proper tender thereof. A mere readiness to pay or to make tender is not sufficient.

SAME—*same—right to possession—demand—tender.*

Where, under the terms of an agreement of conditional sale upon deferred payments, a part of the purchase price has been paid, and payments have been received after they were due, and time is not of the essence of the contract, a demand for performance on the part of the vendee is necessary before the property can be retaken by the vendor. If upon demand the vendee fails to pay the sum due and thereupon the vendor retakes the property a subsequent tender will be too late, but in the absence of such a demand the vendee, in order to replevy the goods, need not prove that he had tendered the balance of the purchase price.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiff obtained judgment against the defendant in an action of replevin to recover possession of a moving picture machine, and damages for its detention.

The evidence showed that the parties, both residents of Honolulu, executed a written agreement on May 19, 1914, whereby the defendant agreed to sell, and the plaintiff

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agreed to buy the machine for the sum of \$275, of which \$100 was paid at the time, and the balance was to be paid as follows: \$25 on June 20, \$50 on July 20, \$50 on August 20 and \$50 on September 20. The agreement provided that until the payment in full of the purchase price title to the machine would remain in the vendor, and in the event that any of the instalments should remain unpaid after they should become due, the vendor was authorized, without any legal process and without prejudice to any other remedy, to enter into and upon the premises where the machine might be and take and carry away the same as his own property, all damages for such entry, taking and carrying away being expressly waived. The plaintiff took delivery of the machine and had possession of it until September 30, 1914, when an agent of the defendant went to the plaintiff's home and, breaking into the room where the machine was, against the protest of the plaintiff's wife, the plaintiff being absent, took the machine, or a part of it, away. The defendant testified that the sum of \$90 of the purchase price remained unpaid and that the property was retaken because of the failure of the plaintiff to pay the purchase price as provided in the agreement. The plaintiff testified that all the instalments had been paid, though not upon the exact dates specified in the agreement, except the final one, and that, as to that one, he had gone to the office of the vendor two or three times on the 21st and 28th of September with the money for the purpose of paying it, but the office was closed and there was no one there. It was also shown that on October 5 the plaintiff tendered the sum of \$50 to the defendant's agent who refused to accept it, and the defendant testified that the tender was refused because it was not the full amount due.

The defendant excepted to the giving to the jury, at plaintiff's request, certain instructions, the gist of which is set forth hereinbelow. Counsel for the plaintiff, while con-

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tending that the instructions referred to were proper, contends that under plaintiff's instruction No. 4, which was given without objection on the part of the defendant, the plaintiff was entitled to a verdict, and that any error that may have been committed in the instructions that were excepted to was therefore harmless. We find, however, that the fourth instruction was erroneous. It was as follows: "I instruct you, gentlemen of the jury, that defendant had no right to break into the premises of the plaintiff in the absence of said plaintiff and take property therefrom without his consent, and if you believe from the evidence that the property of the plaintiff was thus taken by the defendant, then it was unlawfully taken and plaintiff is entitled to its recovery, with damages, if any, for its retention, not to exceed \$500." This assumed that the property belonged to the plaintiff whereas the agreement provided that until the purchase price was paid in full the title to the machine was to remain in the vendor and the rule is that "Where one takes forcible possession of his own goods, he may be liable as a trespasser, but not in replevin; having the right of possession at the time of the seizure, his trespass does not debar him from the right of possession, nor vest the other party with the right to replevy the goods." Cobbey on Replevin, p. 11, citing *Taylor v. Welbey*, 36 Wis. 42; *Bogard v. Jones*, 28 Tenn. 739; *Coverlee v. Warner*, 19 Ohio 29; *Carroll v. Pathkiller*, 3 Porter (Ala.) 279. The mere fact that a trespass was committed did not entitle the plaintiff to a verdict in this action.

The defendant excepted to the giving of instructions which contained the following propositions: That "if you find from the evidence in this case the plaintiff substantially fulfilled the terms of his contract and tendered or was ready to tender the money to fulfill his contract, and the said money was refused, or it was made impossible to pay

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the same because of the absence of the defendant from his place of business, then plaintiff had substantially fulfilled his contract, and he is entitled to a verdict at your hands for a return of the property in question;" and that "if you are satisfied from the evidence that the plaintiff fulfilled his contract, and paid or was ready to pay the sum of \$275 as required in said contract, then it is your duty to find for the plaintiff for the recovery of the property." The defendant had testified, and the plaintiff had denied, that demand had been made on the plaintiff for the balance of the purchase price, but no instruction as to the necessity of making such demand before retaking the property was given or refused, and no point is now made in that connection. Aside from that, it was incumbent on the plaintiff, in order to acquire title, to have paid or tendered the amount due according to the terms of the agreement. A mere readiness to pay or to make tender of the amount was not sufficient, nor was payment or tender excused by reason of the mere fact that the defendant was not at his place of business when the plaintiff called there. The defendant excepted also to the giving of an instruction to the effect that "time was not the essence of said contract, and was not so considered by the parties to it in regard to the payments made, and, therefore, if the plaintiff within a reasonable time after the payment was due, actually tendered the last payment to the defendant, he fulfilled the terms of his contract and was entitled to the property." Granted, that time was not of the essence of the contract and that the final payment could have been made or tendered after its due date, but the only tender of which there was evidence was made several days after the property had been retaken. If the taking of the property had been preceded by a demand by the vendor and failure on the part of the vendee to perform the taking was within the defendant's right and the tender was too late. If no demand was made, the tender was made

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in time, and, if sufficient in amount, was effectual to pass title to the machine. But if no demand was made it was not necessary for the plaintiff, in order to maintain this action, to prove that he made a tender of the balance due under the agreement, for the conditional vendee may be entitled to possession of the property as against the vendor even though he has not acquired title thereto by complete performance. The jury were not adequately instructed in this regard, and the instruction as given cannot be sustained.

The defendant requested that the jury be instructed that if they should find from the evidence "that the purchase price has never been paid in full, the machine still remains the property of the defendant, and your verdict must be for defendant." The court modified the instruction by inserting, after the word "paid," the words "or tendered," and by striking out the words "and your verdict must be for defendant." The defendant excepted to the modifying of the instruction. The court erred in inserting the words "or tendered" without qualification because the tender if made too late was ineffectual. There was no error, however, in striking out the words "and your verdict must be for defendant" since the defendant had no right to take possession of the property unless he had first made demand for the balance of the purchase price or, at least, notified the plaintiff that unless the same was paid the property would be taken. Where under the terms of an agreement of conditional sale upon deferred payments a part of the purchase price has been paid, and payments have been received after they were due, and time is not of the essence of the contract, a demand for performance on the part of the vendee is necessary before the property can be retaken by the vendor. 35 Cyc. 701; *Piano Co. v. Roe*, 85 N. J. L. 160 164; *People's Furniture Co. v. Crosby*, 57 Neb. 282; *New Home Sewing Mach. Co. v. Bothane*, 70 Mich. 443; *Mosby*

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v. Goff, 21 R. I. 494; *Taylor v. Finley*, 48 Vt. 78; *O'Rourke v. Hadcock*, 114 N. Y. 541. Whether demand was in fact made was a question for the jury.

The exceptions to the giving of the three instructions requested by the plaintiff, and to the modification of the defendant's instruction in the respect noted are sustained, and a new trial is granted.

Lorrin Andrews for plaintiff.

J. Lightfoot for defendant.

J. ALFRED MAGOON, ET AL., *v.* LORD-YOUNG ENGINEERING COMPANY, LIMITED, AND CHARLES R. FORBES, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII.

No. 787.

TAXATION OF COSTS.

ARGUED MARCH 8, 1916.

DECIDED MARCH 18, 1916.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE WHITNEY,
IN PLACE OF WATSON, J., DISQUALIFIED.

COSTS—*where government officer a party.*

Where one of two parties against whom a final decree is entered is a public officer and, therefore, not liable for costs, and the other party is a contractor who was acting for his own profit, and who defended against the suit on the same general grounds as the officer, but under his own pleadings, through his own counsel and in his own right, held that all recoverable costs should be taxed against the latter.

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SAME—in equity cases—on appeal.

The rule that costs in suits in equity are in the discretion of the court applies only to costs in the trial court. The costs on appeal of such cases go to the party who prevails in the supreme court under R. L. 1915, Sec. 2548.

SAME—taxable disbursements.

Held, that the cost of photographs of the *locus in quo*; of a transcript of the testimony; of typing the record on appeal; and the amount of the premium on an injunction bond, were taxable as reasonable disbursements in this case. The cost of a duplicate transcript held not taxable as a disbursement or allowable as a counterclaim.

SAME—expert witness fees.

Compensation paid by a party to an expert witness is not recoverable as a taxable disbursement.

OPINION OF THE COURT BY ROBERTSON, C.J.

This was an appeal in a suit in equity for an injunction upon which this court held, reversing the decree appealed from, that the complainants were entitled to the relief prayed for. *Magoon v. Lord-Young Eng. Co.*, 22 Haw. 327. Now the complainants, in connection with a motion for the entry of a final decree, ask to have their costs allowed and taxed. Their bill of costs consists of various items including costs and expenses both in the trial court and in this court and in connection with the appeal. It is conceded that no costs are taxable against the superintendent of public works. The present contest is between the complainants and the Lord-Young Engineering Co., and the company will herein be referred to as the respondent. The bill is objected to by the respondent both generally and specifically, and a contra claim has been presented by the respondent for \$232.75, representing seven-eighths of the cost of a duplicate transcript of the testimony obtained for use in connection with the briefing of the case on appeal. This claim will be dealt with at the outset. We hold that the cost of the whole or a part of a duplicate transcript of the

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testimony obtained by a party to facilitate the briefing of the case on appeal is not taxable as a disbursement, or available as a counter-claim, such transcript being for the mere convenience of the party or his counsel.

The respondent contends that it ought not to be charged with any costs whatever since the vital ground upon which the complainants prevailed was the insufficiency of the notice served by the superintendent of public works upon the owners whose lands it was proposed to fill, and that it was in no way responsible for that defect in the proceeding. But as the question as to the sufficiency of the notices was raised by the pleadings in the court below, and the proceedings leading up to the letting of the contract to the respondent, under which it sought to justify its threatened action, were as vigorously defended and confidently relied on by the respondent as by the superintendent of public works, we think the former cannot now shift upon the latter all the blame attributable to the error. The respondent was a contractor seeking to subject the lands of the complainants to the operation of its contract for its own profit, and it defended against the suit through its own counsel, under its own pleadings, and in its own right. Under these circumstances, we hold that all taxable costs to which the complainants may be entitled should be taxed against the respondent, and that no reduction is to be allowed by reason of the fact that its co-party respondent is exempt. Of the costs charged in the bill the sum of \$504.25 relates to the institution of the suit and hearing in the court below. An item of \$15 for photographs of the complainants' premises and the adjacent neighborhood showing the progress and nature of the work done by the respondent under its contract and filed as exhibits was objected to. Photographs of the *locus in quo* are often useful at the hearing of a case, helping as they do to make clear matters concerning the situation as it exists or existed on the

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ground. The item is allowed as a reasonable and actual disbursement. The objection to an item of \$441.75 paid to expert witnesses who testified at the hearing is sustained. Compensation paid by a party to an expert witness is not recoverable as a taxable disbursement under R. L. Sec. 2540. *Scott v. Kona Development Co.* 21 Haw. 408. The costs incurred in this court and in connection with the appeal amount to \$748.25. The objection to an item under the head "Attorneys costs," of \$3, "Attendance upon trial, supreme court," is sustained. No "trial" was held in this court, and the statute makes no provision for a fee for appearance on appeal in this court. Objection is made to an item of \$580, the cost of the transcript of the testimony. The contention here is that seven-eighths of the testimony recorded in the transcript related to issues upon which the respondents were successful on the appeal, and counsel for the respondent argues that as this was a suit in equity the successful complainants are not necessarily entitled to recover costs, but that, upon equitable principles, the costs may be divided, or denied *in toto* to the prevailing party. 11 Cyc. 32, 37. The rule that in equity the costs are in the sound discretion of the court is well established. *Pennsylvania v. Wheeling etc. Bridge Co.*, 18 How. 460; *DuBois v. Kirk*, 158 U. S. 58, 67. In *Kittredge v. Race*, 92 U. S. 116, 121, the court said "In actions at law, it is a general rule, that the losing parties, or the parties against whom judgment is rendered, are to pay the costs; and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in the subject-matter of the suit. In equity it is different. There the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit." The rule has been recognized in this jurisdiction (*Ahana v. Wah Yat*, 17 Haw. 326, 330), but it applies to the costs incurred in the trial court, whereas the

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objection here goes to an item included in the costs of appeal which stand on a different footing. Under our statute the costs of appeal go to the party who prevails on the appeal irrespective of which party may eventually recover the costs of trial in the court below. R. L. 1915, Sec. 2548; *Hapai v. Brown*, 22 Haw. 20. In this respect no distinction is drawn between appeals from the decrees of circuit judges at chambers and error or exceptions in law actions. In a case, such as this, where the final decree is to be entered in this court, it is proper to tax all the costs which are recoverable, and in an equity appeal, in taxing the costs prior to the appeal, this court may well exercise the same discretion that the circuit judge would if the costs were being taxed by him. In so far as the costs of the hearing below are concerned the contention that they should be divided, under the circumstances of this case, is not sustained. The objection to the charge for the transcript is overruled. *Tyler v. Wise*, 21 Haw. 166. The charge of \$51 for premium and stamp on the indemnity bond given by the complainants upon the injunction obtained by them *pendente lite* is allowed as a reasonable disbursement. And the objection to an item of \$35 paid out for typing the record on appeal is overruled. *Tyler v. Wise, supra*. Section 2540 of the Revised Laws authorizes the taxation of actual and reasonable disbursements on an appeal in this court as well as upon a proceeding in the circuit court or before a circuit judge at chambers. The complainants are regarded as having prevailed on the appeal since, notwithstanding the respondents were successful as to some of the points in issue, they established their right to the permanent injunction which they sought.

Other objections to certain minor items are overruled without comment. The complainants' costs as of the present are allowed and taxed against the respondent in the sum of \$807.75.

Syllabus.

J. A. Magoon and C. H. Olson (Holmes & Olson with them on the brief) for the motion.

F. W. Milverton (Thompson, Milverton & Cathcart on the brief) contra.

THE HONOLULU BREWING AND MALTING COMPANY, LIMITED, A CORPORATION, *v.* CHARLES G. BARTLETT AND FRED HARRISON.

No. 917.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 9, 1916.

DECIDED MARCH 20, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—pleading—demurrer.

A bill in equity to restrain the defendant from selling or otherwise disposing of his property unless he satisfies or secures the payment of an unsecured promissory note given by him, which note has not matured, wherein it is alleged that the defendant is absent from the Territory, a fugitive from justice, does not intend to return to the Territory, and is selling and disposing of his property in the Territory to evade payment of such note and to defraud the payee and other creditors, does not state facts sufficient to entitle the plaintiff to the relief sought, and a demurrer on that ground should be sustained.

SAME—fraud—creditor's bill—discovery.

A court of equity will not entertain a creditor's bill which seeks relief from a fraudulent conveyance, made or contemplated, and a discovery of assets of the debtor in the hands of others, in advance of the maturity of the creditor's demand, especially where the creditor has no lien on the property conveyed or about to be conveyed. The maturity of the creditor's claim in such case is a condition precedent to the granting of such relief.

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OPINION OF THE COURT BY QUARLES, J.

The plaintiff, a domestic corporation, filed in the first judicial circuit December 8, 1915, against the defendants Bartlett and Harrison, its bill in equity, wherein it alleges that on the 27th day of April, 1915, the defendant Bartlett executed and delivered a certain promissory note of that date for the sum of \$1555.20 to one T. A. Marlowe, said note being payable to the order of said Marlowe two years after date; that on the 29th day of September, 1915, the said Marlowe assigned the said note to the plaintiff without recourse; that the plaintiff, for a valuable consideration, became the owner and holder of said note; that on the 8th day of May, 1915, the defendant Bartlett absconded and left the Territory of Hawaii and thereafter was indicted on six charges, four for embezzlement, one for forgery and one for uttering forged paper; that bench warrants for the arrest of the defendant Bartlett duly issued but have not been served, the said defendant being absent and a fugitive from justice and does not intend to return to Hawaii; that said defendant left without the intention of returning and did not make any provision for the payment of said note, and plaintiff verily believes that said defendant does not intend to pay said note or any part thereof; that, on information and belief, plaintiff alleges that said defendant intends to dispose of all his real and personal property in the Territory of Hawaii before said note becomes due and payable and intends to cheat and defraud this plaintiff out of the full amount of said note which the plaintiff now owns and holds and to prevent which the plaintiff has no remedy at law; that the said defendant owns certain described real property in Honolulu, mortgaged to the Bank of Honolulu to secure an indebtedness in the sum of \$17,500. The bill then alleges that the defendant Bartlett, on May 5, 1915, executed and delivered to his codefendant

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Harrison a power of attorney containing general powers, among others, to sell and convey real estate; that on May 15, 1915, the said defendant Harrison, acting under said power of attorney, executed, with the wife of said defendant Bartlett, to one O. A. Steven, an option to purchase said real property at the sum and price of \$20,000, of which purchase price the receipt of \$500 was in said option acknowledged. The bill further alleges that the defendant Bartlett owns certain money and personal property in the hands of the defendant Harrison, the amount, description and value of which is unknown to the plaintiff; that said defendant Bartlett has sold and disposed of the most of his personal property, including his household furniture, and is now in the Republic of Mexico, does not intend to return to Hawaii, and intends, through his said attorney-in-fact, the defendant Harrison, to sell and dispose of all of his property in Hawaii for the purpose of cheating and defrauding the plaintiff and other creditors of their just dues, and plaintiff fears that it will lose the whole amount of said promissory note. Plaintiff in its said bill propounds a number of interrogatories to the defendant for the purpose of ascertaining and discovering the amount, description and value of all personal property in the hands of said defendant Harrison, owned by defendant Bartlett, and prays for such discovery, for an injunction restraining the defendants from selling and disposing of any property in Hawaii owned by defendant Bartlett until provision is made for the payment of said note to the plaintiff, and for general equitable relief.

Upon filing the bill a circuit judge in said circuit made an order requiring the defendants to appear on the 11th day of December, 1915, and show cause, if any they could, why said injunction prayed for should not issue, and requiring the defendant Harrison to appear before said judge on the 23rd day of December, 1915, and show cause, if any he

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could, why he should not answer the said interrogatories propounded in the said bill. The circuit judge made an order restraining the defendants, *pendente lite*, from selling, disposing or encumbering any property in Hawaii belonging to the defendant Bartlett.

To the plaintiff's bill the defendants filed their several demurrers upon the ground that said bill does not state facts sufficient to entitle the plaintiff to the relief demanded, either by injunction or by a discovery, and that the circuit judge, sitting in equity, has no power to grant the relief demanded by the plaintiff in its said bill. These demurrers were overruled by the circuit judge, and from the order overruling the said demurrers an interlocutory appeal was requested by the defendants and allowed by the circuit judge, and upon such interlocutory appeal the cause is before us. We must either affirm or reverse the order overruling the said demurrers.

The controlling question here is: Has a court of equity in this jurisdiction, under the allegations of fact contained in the bill, power to restrain a debtor from selling and disposing of his property unless he gives security for a debt not yet due? The note alleged in the bill will not be due until April, 1917. It was taken by the original promisee without security, and the obligation of payment, by agreement of the parties, postponed for a period of two years. The note is negotiable in form. In other words, the promisee impliedly agreed to wait two years for payment without security. Under the allegations of the bill the inference arises that when the plaintiff took the assignment of the note without recourse it knew that Bartlett had absconded, knew that he had been indicted for embezzlement, knew that he did not intend to return, and knew that he was selling and disposing of his property in Hawaii, as the allegations of the bill show that these things had occurred prior to the assignment of the note in question to

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the plaintiff, and there is no allegation in the bill that these things, or any of them, were unknown to the plaintiff. Is the plaintiff in any better condition than the original promisee? It does not claim to have a lien on the property of the defendant Bartlett in this jurisdiction. It is simply asking that the defendant Bartlett be denied by injunction the right, which is inherent in every man, to make contracts, to acquire, sell and otherwise dispose of property. Here equity is appealed to to tie up Bartlett's business; to prevent him from selling or disposing of his property; to hold it, how long? Until the plaintiff's debt matures, some eighteen months? No, not if Bartlett will give security that he will pay the debt when it matures, but to tie his property up until he does give such security. When the note was given there was not, so far as the allegations of the bill are concerned, any agreement, express or implied, on the part of the promisor that he would not sell his property; or that he would not leave the jurisdiction of Hawaii to remain out of it the remainder of his natural life; or that he would not remove his property from the jurisdiction of Hawaii. Has equity the power to tie the hands of the defendant Bartlett with respect to selling and disposing of his property unless he does something not required by his contract with the assignor of plaintiff, but contrary to that contract, namely, give security for the payment of the note mentioned in the bill of complaint? Equity follows the law, does not oppose the law; it assists parties in the protection of their legal rights when the law is unable to do so; it protects the vigilant, but does not invade private fundamental rights to impose under a contract obligations not assumed in such contract, either by express terms or by necessary implication. To grant the relief sought by plaintiff would be to impose new obligations not contemplated either by the promisor or the promisee when the note in question was given, and to say

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to the promisor, notwithstanding the promisee agreed that you should have the use of the money for which such note was given for the period of two years without security, you are now, because you have left this jurisdiction, because you do not intend to return to Hawaii and do not intend to pay this note when it does mature, required to give security that you will pay it when it becomes due or else you are restrained from selling and disposing of your property in Hawaii. This would be the exercise of a very broad power and one which we cannot admit exists except it be upon clear and undoubted authority recognized in equity jurisprudence as ample justification for the exercise thereof. Do the authorities justify the exercise of such power?

Our law permits suits to recover debts that are due, that have matured. Prior to judgment an attachment may be obtained to reach property subject to execution, and other property, money, choses in action and securities in the hands of an agent or trustee may be garnisheed and held to await the termination of the action. Why did not the plaintiff avail itself of these legal steps to secure the said promissory note? Simply because the note is not due, and by agreement of the parties thereto the promisor is not required to pay it prior to April, 1917. By implied agreement the assignor of the plaintiff postponed payment and waived security for the payment of the note, hence cannot attach the property of the defendant Bartlett in the Territory nor garnishee any property, money or credits that he may have in the hands of the defendant Harrison or others. In enumerating the powers of circuit judges, sitting in equity, section 2473 R. L., among others, in relation to actions by creditors, provides: "Bills by creditors to reach and apply in payment of a debt, any property, right, title or interest, legal or equitable of a debtor, within this Territory, which cannot be come at to be attached or taken on execution in a suit at law, against such debtor." The prop-

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erty of Bartlett, named in the bill of complaint, can "be come at to be attached or taken on execution in a suit at law" against him by a creditor, and if plaintiff could sue on the note aforesaid it could reach said property by attachment, garnishment or execution. The only thing in the way of plaintiff's doing so is the agreement of its assignor to wait until April, 1917, without security for payment of said note. Equity steps in and assists where law, when resorted to, is powerless, but refuses to assist by canceling fraudulent transfers of property by a debtor prior to the maturity of his debt in order to assist the collection of the debt when it shall mature. It is a necessary condition precedent to invoking the aid of equity in such cases that the debt be due (*Freider v. Lienkauff*, 8 So. 758; *Jones v. Massey*, 79 Ala. 370; *Evans v. Thornburg*, 77 Ind. 106; *McGhee v. Importers' and Traders' National Bank*, 9 So. 734; *Simon v. Ellison*, 22 S. E. 860). The rule is general that creditors who have not exhausted their legal remedies cannot resort to equity for assistance, and must therefore reduce their claims to judgment and generally must have execution issued and returned unsatisfied, thus demonstrating to a certainty the need of aid in equity (*Middle-ditch v. Kalaniana'ole*, 18 Haw. 272; *Hatch v. Daugherty*, 145 Mich. 569; *State Bank v. Knox*, 1 Dev. & B. Eq. 50, *Bethell v. Wilson*, 1 Dev. & B. Eq. 610; *Phelps v. Foster*, 18 Ill. 309; *Wiggins v. Armstrong*, 2 Johns Ch. 144; *Detroit Copper and Brass Rolling Mills v. Ledwidge*, 162 Ill. 305; *Tate v. Liggat*, 2 Leigh 91; *Roan v. Winn*, 93 Mo. 503; *Hood v. Saunders*, 11 Colo. 106; *Moore v. Omaha Life Ass'n.*, 62 Neb. 497; *Neuman v. Dreifurst*, 9 Colo. 228; *Viquesney v. Allen*, 131 Fed. 21; *Taylor v. Bowker*, 111 U. S. 110; *National Tube Works Co. v. Ballou*, 146 U. S. 517, 523; *Scott v. Neely*, 140 U. S. 106, 115; *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 612). To this general rule there are some exceptions, for instance: Where the

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creditor has a lien on, or equitable interest in, the property of his debtor which is in danger of being lost (*Case v. Beauregard*, 101 U. S. 688; *Ober v. Gallagher*, 93 U. S. 199, 208; *Cates v. Allen*, 149 U. S. 451, 461); or, the debtor's estate is a mere equitable one which cannot be reached by any proceeding at law (*Case v. Beauregard, supra*; *Day v. Washburn*, 24 How. 352; *Wyman v. Wallace*, 201 U. S. 230, 242); or, the debtor is a partnership (*Nelson v. Hill*, 5 How. 127; *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, and other authorities). The plaintiff has not shown in its bill that it comes within any of the exceptions to the general rule and does not claim that it has any lien upon, or equitable interest whatever in, the property of the defendant Bartlett. We are of the opinion that granting the relief sought by plaintiff's bill would be an unwarranted invasion of fundamental rights. If, as the authorities hold, a creditor whose debt is not due, who has not exhausted his remedies at law, cannot come into a court of equity and attack a conveyance theretofore fraudulently made, there is more reason in holding that he shall not be permitted to come into such court and seek the aid of the chancellor in tying his debtor's hands for the purpose of preventing the making of such a conveyance.

The Virginia court in *Tate v. Liggat, supra*, at page 99, has well said: "It is admitted to be well settled, as a general rule, that a creditor at large (one who has not in some way acquired a right to have satisfaction out of his debtor's property, specifically), cannot come into a court of equity to impeach any conveyance made by his debtor on the ground of fraud, and, consequently, that the court of chancery had no jurisdiction in the first of these suits, unless, as it was insisted by the counsel for the appellees in that suit, the rule is liable to exceptions, within one of which this case falls. The rule is founded upon the principle of the common law, essential to the enjoyment and circu-

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lation of property, that every debtor, until his property is specifically bound to the satisfaction of his debt, by his own agreement or by some judicial proceeding, has an absolute right to dispose of it at pleasure, to prefer one creditor to another, or even to waste or destroy it; a power which no tribunal whatever has authority to control or limit. The obligation of a debtor is purely personal and in no way affects his property or any portion of it; and so long as his person is amenable to the process of the courts of justice there are no means of reaching or affecting his property but through that medium, and after judgment or decree against him personally."

In our opinion the bill presents no equity, and the facts alleged therein are not sufficient to entitle plaintiff to the relief demanded, wherefore the demurrers of the defendants to the said bill should have been sustained.

The order overruling the said demurrers is reversed with costs to the appellant and the cause remanded for further proceedings consistent with the views herein expressed.

C. S. Davis (*G. A. Davis* with him on the brief) for plaintiff.

W. B. Lymer (*Lindsay & Lymer* on the brief) for defendants.

Syllabus.

H. M. VON HOLT, TRUSTEE UNDER THE WILL OF
GODFREY RHODES, DECEASED, v. ADA TREE
RHODES WILLIAMSON AND ELLEN TREE
WILLIAMSON, A MINOR.

No. 903.

SUBMISSION WITHOUT ACTION.

SUBMITTED MARCH 18, 1916.

DECIDED MARCH 23, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

TRUSTS—*gifts by implication—accumulations—resulting trusts—wills.*

A testator devised and bequeathed all his property to a trustee upon trust to pay the income thereof to his wife during the term of her natural life, and from and after her death to apply so much of the income as may be necessary for the maintenance and education of his daughter until she should attain the age of twenty-one years, also to pay to his sister-in-law the sum of \$500 per annum; and if the daughter should die leaving lawful issue to pay and deliver over to such issue, if of age, the whole of the property, and if not of age, to continue to hold it, using the income therefrom for their maintenance until they should become of age, and then to deliver over the property to the issue; and after the death of the wife, sister-in-law, and daughter (if without issue), to convert the estate into money and divide the same as directed in the will. Held, that the testator did not give the income to the daughter during her life after reaching the age of twenty-one (his wife and sister-in-law having died) by implication; that he did not intend that the income should accumulate; but that there was a resulting trust as to such income, as an undisposed of beneficial interest, in favor of the daughter as sole heir.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

(Quarles, J., dissenting.)

This is a controversy submitted upon agreed facts which involves the construction of the will of Godfrey

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Rhodes, late of Honolulu, deceased. The material parts of the instrument are as follows:

"First: I give, devise and bequeath all of my real and personal estate both in California and in the Hawaiian Islands, to my nephew, Cecil Brown, upon the trusts, and to and for the uses and intents following, and none other, that is to say: Upon trust to stand seized of the real property and to stand possessed of the personal property of every name and description whatsoever, and with power to my said trustee or his successor to sell and dispose of all or any of my real property situate in the County of Alameda, State of California, for such price and at such times as he or his successors may in their discretion think fit:

"1. To pay all the rents, issues, income and profits thereof unto my wife, Nancy Rhodes, for and during the term of her natural life. And from and after the death of my said wife

"2. To apply so much of the income of such property as may be necessary, to the proper support, maintenance and education of my daughter, Ada Tree Rhodes, until she shall have attained the age of twenty-one years. It is my wish that she shall be educated, and my said trustee is hereby directed to have her educated in a Catholic Convent, in the Catholic faith, during the years of her minority.

"3. To pay to my sister-in-law, Maria Chapman, should she survive my wife, during her life, out of the income of my said estate, five hundred dollars per annum.

"4. If my daughter, Ada Tree Rhodes, dies, leaving lawful issue, to pay over and deliver to said issue, if they be of age, the whole of said property, if not of age, to hold the same, using for their maintenance and support the income therefrom, until they be of age, and then to pay over and deliver to such child or children, lawful issue of my said daughter, the said property.

"5. After the death of my wife, my sister-in-law and my daughter, if my daughter die, without issue, to sell all of the remainder and residue of my said estate, either at public auction, or at private sale, for cash, and pay over one-half of the proceeds thereof in equal shares to my own nieces and the nieces of my wife.

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"Of the residue and remainder to dispose as follows:

"To pay to the 'Homeless Child' Charity in New York, in the United States of America, one quarter of said residue and remainder.

"To pay to the Catholic Mission in Honolulu in the Hawaiian Islands, one quarter of said residue.

"And any money still remaining in his hands, I direct my said trustee to pay to said (such) Catholic Charity in England as shall seem in his judgment to be most like the said 'Homeless Child' Charity in the said City of New York."

The agreed facts are that the testator died on September 8, 1897; that the will was duly probated; that the present trustee was appointed upon the resignation of the trustee named in the will; that Mrs. Williamson is the daughter of the testator and the only child who has survived him; that she has attained the age of twenty-one years; that Ellen Tree Williamson is the only child of Mrs. Williamson and is of the age of four years; that the wife and sister-in-law of the testator, named in the will, are both dead; and that the trustee has in his hands net income which has accrued since Mrs. Williamson attained the age of twenty-one years (and, we understand, since the death of the widow) in the sum of \$487.02, which, because of his uncertainty as to the proper disposition to be made thereof, he has refused to pay over to Mrs. Williamson. The question is whether Mrs. Williamson, who has attained the age mentioned, the wife and sister-in-law of the testator having died, is entitled to receive the income accruing to the estate.

The trustee stands impartial in the controversy, but his counsel, with a view to assist the court in arriving at a correct conclusion, have argued that upon a careful examination of the will it will be found that the testator's child (Mrs. Williamson) was given the income (except that given to the sister-in-law) from the time of her reaching the age of twenty-one, after her mother's death, during her

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life-time, by necessary implication. This contention has in its favor the principle that an ambiguous will should not be construed so as to take property from an heir unless the intent of the testator to do so be clear. But a gift by implication can arise only upon the language of the will and where it is such that an intention contrary to the implication cannot reasonably be found. *Chater v. Carter*, 22 Haw. 34, 49; *O'Hearn v. O'Hearn*, 114 Wis. 428; *Myrick v. Williamson*, 67 So. (Ala.) 273. A devise of property to A upon the death of B is a common illustration. There, by necessary implication from the language of the will, B will be held to have been given a life estate in the property. But there is not an equivalent expression in the will in hand with reference to the income of the estate. Nor was the daughter given any part of the principal. We do not find in this will any language whatever from which a gift of the income to the daughter during her life may be implied.

Counsel for Mr. Williamson, as father and natural guardian of the testator's grandchild, contends that the will contains no language to support an implied gift of the income to the daughter, that the presumption against partial intestacy applies, and that, therefore, it must be held that the income would necessarily accumulate and upon the daughter's death go to the grandchild or other beneficiary according to the terms of the will. The presumption against partial intestacy, strictly speaking, does not enter into this case since the legal title to the entire estate passed to the trustee. As against the claim of the grandchild the point is whether there was a resulting trust as to the income in question to Mrs. Williamson as the sole heir of her father. One weakness in the position taken on behalf of the grandchild lies in the fact that the will contains no express provision for or reference to an accumulation of the income, and the gift to grandchildren was of "the

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property," with direction to the trustee that if they should be under age at the time of the death of their mother to use the income for their maintenance and support while minor. This is a highly important factor in view of the evidence, prominent in the will, of the differentiation existing in the mind of the testator between the corpus of the estate which he possessed and the income which was to accrue from it after his death. And it would be difficult indeed to attribute to a testator an intention to have income accumulate for grandchildren while a daughter lived for whom he had made no provision beyond that of maintenance and education until she attained the age of twenty-one years. Furthermore, the testator's daughter might not have married, or marrying, might not have had a child; and the right of a grandchild, niece, or either of the charities to take the principal of the estate was made contingent, as to a grandchild, upon its surviving its mother, and as to any niece and the charities, upon the absence of a surviving grandchild. We regard all this as sufficient to overcome the idea that the income would naturally follow the corpus of the estate as an incident thereto. The residuary provisions do not require the construction contended for by counsel. The last clause covering "any money still remaining" was intended presumably to provide for a possible lapse as to any of the bequests made in the fifth paragraph. We are unable to sustain the claim advanced on behalf of the grandchild.

There is no contention, and it is evident that none could be successfully made, that the trustee took any beneficial interest in the property or the income.

It inevitably follows from this situation that there is a resulting trust in favor of the heir. By his will the testator gave all his property to the trustee (with power to sell the land in California) to hold the same until the death respectively of his wife, sister-in-law and daughter, and,

Quarles, J., dissenting.

unless there were minor grandchildren, in which event to continue to hold until they should become of age, to then dispose of it according to the directions. In the meantime, the accruing income, which the testator had in mind as distinct from the principal and subject to separate treatment, the trustee was to pay over to the widow so long as she lived, and upon her death to pay five hundred dollars a year to the sister-in-law, and if his daughter had not reached the age of twenty-one, to maintain and educate her out of it until she should arrive at that age. Then no further mention is made of the income until the possible contingency is reached of the daughter dying leaving minor children, in which event it is to be used for the maintenance and support of such minors. Though we have found no adjudicated case involving analogous facts, the principle is clearly applicable here that where property is devised or bequeathed in trust and the whole beneficial interest is not disposed of there is a resulting trust with respect to the portion undisposed of. 15 A. & E. Enc. Law (2nd ed.) 1130; 3 Pom. Eq. Jur. (3rd ed.) Sec. 1034; *Sears v. Hardy*, 120 Mass. 524, 541; *Skellenger v. Skellenger*, 32 N. J. E. 659; *Longley v. Longley*, L. R. 13 Eq. 133; *Davidson v. Foley*, 2 Bro. C. C. 203. We hold that under the events which have happened there is undisposed of income to which Mrs. Williamson, as the sole heir of her father, is entitled by way of the resulting trust.

Judgment may be entered in her favor against the trustee for the sum of \$487.02.

Frear, Prosser, Anderson & Marx for the trustee.

Holmes & Olson for Ada T. R. Williamson.

Lindsay & Lymer for Ellen T. Williamson, a minor.

DISSENTING OPINION OF QUARLES, J.

I concur in the conclusion of the majority that there is no implied gift of the income (accruing subsequent to

Quarles, J., dissenting.

the death of the widow and sister-in-law of the testator) to the daughter, Mrs. Williamson. I also concur in the conclusion that there is no intestacy as to such income.

I am unable to concur in the conclusion that the beneficial interest in the trust property, including income, is not fully disposed of by the will, for which reason a resulting trust arises in favor of Mrs. Williamson, the daughter, as to such income. In my opinion the testator intended to conserve the trust property, the corpus as well as the income, and for that purpose provided that after the death of his wife that only so much of such income as might be necessary should be used to support, maintain and educate his daughter, Mrs. Williamson, until she should attain the age of twenty-one years, excluding the idea that she should further participate in such income. The fourth paragraph of the will shows that the testator intended that the trust property, including the income, should be held until the death of his daughter and then distributed to her children surviving her if they then be of age, but if not adult they should be supported and maintained out of the income until of age when the property (corpus and income) should be distributed among them. In my opinion, both by operation of law and intent of the testator, found in the will, such portions of the income as are not specifically directed to be otherwise applied follow the corpus of the trust property and were intended by the testator to be finally disposed of with the corpus of such property.

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J. P. LOONEY AND R. W. SHINGLE *v.* TRENT TRUST
COMPANY, LIMITED, AS EXECUTOR OF THE
WILL AND ESTATE OF E. C. RHODES, DE-
CEASED.

No. 918.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED MARCH 23, 1916.

DECIDED MARCH 27, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

SPECIFIC PERFORMANCE—*suit against executor—parties.*

Under Chap. 159, R. L., where a testator, during his lifetime, sold to plaintiff certain real estate and received the full purchase price thereof and executed a written agreement wherein he promised to make, execute and deliver to the plaintiff a deed for such real estate, but died before doing so, a suit may be maintained for specific performance of such written contract against the executor of testator's estate without joining the heirs or devisees of the testator.

OPINION OF THE COURT BY QUARLES, J.

The plaintiffs, J. P. Looney and R. W. Shingle, filed their bill of complaint against the defendant, Trent Trust Company, Limited, as executor of the will and estate of E. C. Rhodes, deceased, to obtain a decree of specific performance. The facts alleged, briefly stated, are as follows: The testator died in California February 14, 1915, leaving an estate in the Territory of Hawaii. The defendant, Trent Trust Company, Limited, duly qualified on August 30, 1915, as executor of the last will and testament of the said testator before a circuit judge of the first circuit and ever since has been such executor and acting as such. The testator, in November, 1914, sold to the plaintiff Looney lot 9, Alewa Heights, in Honolulu, Territory of Hawaii, for

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the sum of \$236 cash then paid, delivered to the said plaintiff the said lot 9 and also a writing in words and figures as follows: "No. 627 Beretania Street, Honolulu, T. H. Received of J. P. Looney Fifteen (\$15.00) Dollars the same to be used by me paying expenses of making and executing a deed to lot No. 9 Alewa Heights, Honolulu, Oahu, Territory of Hawaii. I agree to make and execute this deed as soon as I arrive home in California (on or about December 1st, 1914). The purchase price of said Lot No. 9, Alewa Heights, has all been paid to me by J. P. Looney, and I acknowledge the receipt of the same. It is agreed that I shall deed the lot to R. W. Shingle to be held as security for money loaned for the purchase price of said lot. E. C. Rhodes." The said purchase price, borrowed by the plaintiff Looney from the plaintiff Shingle, was fully repaid to the plaintiff Shingle by the plaintiff Looney. The plaintiff Looney has at all times been in possession of the said lot 9 since he purchased the same as aforesaid and has made valuable improvements thereon, paid all taxes and assessments against said lot, and has performed all the stipulations of the said contract of sale to be by him performed. The testator died without having made a deed conveying the said lot to the plaintiffs or either of them. The plaintiff Looney, on December 22, 1915, at Honolulu, presented his claim in writing, under oath, to the defendant and demanded the execution by defendant, as executor aforesaid, of a deed to him of said lot 9, but the defendant failed and refused to make such deed and still fails and refuses to make such deed. Plaintiffs pray that plaintiff Looney be decreed to be the owner of the said lot and entitled to a specific performance of the said contract and that the defendant, as such executor, be ordered, directed and decreed to make and deliver a good and sufficient deed conveying such lot 9 to the plaintiff Looney and for general

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equitable relief. To the said bill of complaint the defendant filed its demurrer upon the ground that the said defendant is not a necessary or proper party to the suit, and upon the further ground of nonjoinder of parties defendant in that the heirs and devisees of the testator are not joined as defendants. The demurrer was overruled and the defendant answered admitting many of the allegations of the bill and alleging want of knowledge as to the truth of other facts alleged. The cause was heard and the circuit judge, sitting at chambers in equity, found the allegations of the bill to be true and decreed that the defendant, as executor of the last will and testament of the testator, execute and deliver, pursuant to the said written agreement of sale, to the plaintiff Looney a good and sufficient deed conveying to said plaintiff Looney all the right, title and interest which the said testator had in said lot 9 at the time of making the said agreement, with cost of suit. From said decree the defendant has appealed.

The only matters argued before us, either in the briefs of counsel or orally, are, whether the plaintiffs can maintain this suit and obtain the relief prayed and decreed against the defendant as executor, or whether they should join the heirs and devisees of the testator as defendants. At common law the realty descended to the heirs (unless devised, when it passed to the devisees) subject to payment of the debts of the deceased ancestor or testator in case the personalty was insufficient, and that is the rule here unless changed by statute. In chapter 159 of the Revised Laws, under the head of "Specific Performance," we find the following sections:

"Sec. 2834. Against heirs, executors, etc., within one year. When any person, who is bound by a contract in writing to convey any real estate, shall die before making the conveyance, the other party may have a bill in equity before a circuit judge, to enforce a specific performance of

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the contract by the heirs, devisees, or by the executor or administrator of the deceased party, such bill to be filed within one year after the grant of administration."

"Sec. 2835. Decree in such case. The judge shall hear and decide every such case, according to the proceedings in chancery, and shall make such decree therein as justice and equity may require."

"Sec. 2836. Deed by whom. If it shall appear that the plaintiff is entitled to have a deed of conveyance, the judge may authorize and require the executor or administrator of the deceased party, to convey the estate in like manner as the deceased person might and ought to have done, if living; and if his heirs or devisees, or any of them, are within the Territory and competent to act, the judge may direct them or any of them, instead of the executor or administrator, to convey the estate in the manner before mentioned, or to join with the executor or administrator in such conveyance."

"Sec. 2837. Deed, effect of. Every conveyance made in pursuance of such decree, shall be effectual to pass the estate contracted for, as fully as if made by the contractor himself."

These statutes were intended to change the common law rule in cases like the one at bar where the deceased had during his lifetime sold real property but had failed to make a conveyance thereof agreed by him to be made. The statute authorizes the suit against the executor or against the heirs or devisees, as the case may be, at the option of the plaintiff, regardless of the extent of the indebtedness, or whether or not the personal property left is sufficient to satisfy such debts, hence there is no non-joinder of parties defendant and the defendant is a proper party defendant. The plaintiff had bought the premises, fully paid for the same, received possession from the testator, made valuable improvements upon the lot in question, and, under the written agreement, was entitled to a deed from the testator while living, and after his death is entitled to a deed pursuant to the said written agreement

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either from the defendant, as executor, or from the heirs and devisees, if any there be, at his option. The demurrer was properly overruled.

Counsel for appellant—defendant—have failed to comply with the requirements of Rule 3 of this court as amended October 4, 1915 (22 Haw. 795), which requires that the appellant's brief contain, among other things, "a specification of the exceptions or assigned errors which are relied upon." This rule was intended to apply to all cases, especially appeals in equity suits like the one under consideration. It frequently happens that a cause comes into this court on numerous exceptions, many of which are not discussed in the brief or argument or expressly abandoned. In cases of writ of error some of the errors assigned are frequently abandoned or ignored by counsel for the appellant in arguing the cause. It therefore becomes of importance to the court and opposing counsel for the appellant in the opening brief to specify the errors upon which he relies and seeks a reversal. This rule was adopted for the purpose of assisting counsel in presenting, and the court in considering, only such errors as are of sufficient importance to be argued. The object of the rule is to eliminate exceptions taken and errors assigned hastily and without consideration, as frequently happens, and especially for the purpose of avoiding the necessity of the court in appeals in equity cases from having to search through the record for errors relied on by the appellant. No specifications of error are contained in the brief for the appellant, but only one question of law being involved, and this question having been argued by respective counsel without objection to the absence of a specification of errors in appellant's brief, we concluded to pass upon the merits of the question involved. We do not desire to be understood as establishing a precedent in this case to be followed hereafter, and desire counsel to understand that the said

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rule must be substantially complied with in all cases.

The decree is affirmed with costs to the plaintiffs appellees.

J. T. DeBolt for plaintiffs.

C. S. Franklin (*Thompson, Milverton & Cathcart* on the brief) for defendant.

IN THE MATTER OF THE ESTATE OF ALFRED S.
HARTWELL, DECEASED.

No. 908.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED MARCH 14, 1916.

DECIDED MARCH 28, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

WORDS AND PHRASES—"children."

The general construction of the word "children" accords with its popular signification, namely, as designating the immediate offspring.

WILLS—*devise to children as a class.*

A testator by his will gave his residuary estate "in equal shares to all my children who shall be living at my decease." Held, that the term "children" must be construed in its proper sense as designating the immediate offspring, and this construction is unaffected by the fact that at the time of the making of the will, and at his death, there was living a grandchild of the testator's, the son of a deceased daughter, who but for the will would have been entitled as an heir at law to share in the estate of his grandfather.

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OPINION OF THE COURT BY WATSON, J.

This is an appeal from a decree of distribution made by a circuit judge of the first circuit sitting at chambers in probate. Alfred S. Hartwell, a resident of Honolulu, and a former chief justice of this court, died on the 30th day of August, 1912, leaving a last will and testament dated April 22, 1912, whereby, after devises and bequests of specific property to his son and certain of his daughters by name, he gave the residue of his property "in equal shares to all my children who shall be living at my decease." When he made his will he had seven children, six daughters and a son, all of whom survived him. One daughter, Mrs. Charlotte Lee Hartwell Chater, had died on the 3d day of September, 1909, leaving the appellant, who was born some three or four days before his mother's death, surviving. The testator knew that his said daughter was dead and that the appellant was living at the date of his will.

The residue of the testator's estate consists of personal property, including money, amounting to about \$115,000 in value. The minor, through his guardian, appeared and made claim to a distributive one-eighth share of such residuary estate on the ground that the devise, above quoted, was a devise to *issue* living at the decease of the testator, basing the claim on the grounds (1) that the testator so understood the words in question; (2) that any other construction would cause a disherison of the lawful heir of the testator, and (3) that such minor grandchild would otherwise take as a pretermitted heir. The claim of the minor was rejected by the court below and a decree entered ordering distribution under the will to the seven surviving children of the testator of the entire residue of the estate, excluding the appellant from such distribution. From this decree the appeal was taken by the minor.

The third ground, above stated, that the minor would take as a pretermitted heir in the event the word

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"children," as used in the will, is construed to mean other than "issue," is not urged in this court except as a reason why such word (children) should be given the meaning contended for by the appellant. It may be well here to note that in this Territory there is no statute making provision for children or the issue of a deceased child whose ancestors have by their wills made no provision for them. Such statutes exist in many States (Stimson's Amer. Stat. Law, Sec. 2842), but, as was said in *Culp v. Culp*, 142 Ind. 159, 163, in this jurisdiction "it is a privilege of an ancestor to make such inequality of division among his children as he may desire, and if he so desires it, he may leave a child without an interest in his estate. The child, unlike the wife, has no such legal interest in the father's estate that it can be enforced regardless of testamentary provision." Now as to the meaning of the word "children."

"The technical legal import of the word 'children' accords with its ordinary and popular signification. It does not denote grandchildren; and, though some times used with that purpose and effect, there is no warrant for thus enlarging its meaning in construing a will, unless indispensably necessary to effectuate the obvious intent of the testator. It may be regarded as well settled that such enlarged or extended import of the word 'children,' when used as descriptive of persons to take under a will, is only permissible in two cases. First, from necessity, where the will would be otherwise inoperative, and second, where the testator has shown by other words that he did not use the word in its ordinary and proper meaning, but in a more extended sense. About this rule of construction there seems to be no conflict in the authorities. (Roper on Legacies, vol. 1, 69; Jarman on Wills, volume 2, 51-2; Phillips v. Beall, 9 Dana, 2; Yeates v. Gill, 9 B. Mon., 204; 12 B. Mon., 115.)" *Churchill v. Churchill*, 59 Ky. (2 Met.) 466, 469.

In addition to the authorities cited in the case last referred to we might add the following: *Adams et al v. Law*, 17 How. (U. S.) 419, 421, 15 L. Ed. 149; 2 Words &

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Phrases, p. 1128; 2 Jarman on Wills, pp. *147, *148; 2 Underhill on the Law of Wills, §548, pp. 714, 715; 2 Williams on Executors, 1182, 1183; *Hopson's Ex'r v. Commonwealth for use of Shipp, etc.*, 70 Ky. 644, 647; *Pimel v. Betjemann*, 183 N. Y. 194, 200, 201.

Quoting from the brief of counsel for the children "It is obvious that neither of the two established exceptions applies to the present case. The testator left seven children of the first generation surviving him, so that the will is operative without extending the term. Nor is there anything in the will which indicates the intention of the testator to include grandchildren under the term 'children.' The will is peculiarly free from words and phrases on which such an argument could be built up."

Counsel for appellant concede the correctness of the rule that the general construction of the word "children" accords with its popular signification, namely, as designating the immediate offspring, but contend (1) that where, as here, a grandchild and heir will be disinherited if the word is given its ordinary and usual signification, "the equity of the case, the reason of the thing, demands that the word 'children' in this will should stand for a grandchild, child of a deceased child, as well as for the immediate issue," and (2) that the testator so understood the use of the words in question and gave this construction to them, where, as here, the equity of the case demanded it, in an opinion rendered by him as a judge of this court shortly before his death. We cannot sustain the contention of counsel that "the equity of the case" demands that the word "children," as used in this will, should be construed to include a grandchild, the issue of a deceased child, on the theory that otherwise one who was an heir at law of the testator at the time the will was written will be disinherited. The only inequity suggested is that the appellant did not get the share of his grandfather's estate which he

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would otherwise, as an heir at law, have been entitled to had the grandfather died intestate. The facts in the case of *Hunt's Estate*, 133 Pa. St., 260, are almost on all-fours with those in the case at bar, except that in that case the minor, a grandchild of the testator, by the aid of certain explanatory notes endorsed on the margin of the will and codicil by the testator, was able to make a much stronger showing of the testator's probable intent to so include the grandchild than has appellant here. But the supreme court of Pennsylvania, reversing the decision of the lower court, held that the grandchild was not included in the term "children" as used in the codicil, and that she had no interest in the estate of her grandfather, the testator. In that case, as in the one at bar, counsel for the grandchild claimed that their client, being an heir, nothing but words of express exclusion could take away her right (p. 269). The court, in language which is peculiarly applicable to the facts in the case at bar, on page 273 said:

"The grandchild is nowhere named in the will. She is not a legatee by name, nor is she even spoken of or referred to as his grandchild, or, specifically, as a legatee of anything. * * * Under the will the grandchild could come in, not because she was named as a legatee, but because she was one of a class to the whole of whom the residue was given. * * * The grandchild * * * is not a member of the class named in the codicil; and to let her in under the codicil would be to destroy the whole scheme of distribution as established by the codicil."

We think other language would have been used if the testator had intended that this child of his deceased child should share in the residuary estate disposed of by the will and that had he intended appellant should take he would have specifically bequeathed to him the share which would have gone to his deceased mother, if alive.

It is not disputed by appellant that a testator may disinherit one who but for the will would be entitled to share in

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the estate (1 Bl. 449; *Culp v. Culp*, 142 Ind. 163), but in support of his contention that the word "children," as used in the will before us, must be construed to include this grandchild it is argued that heirs are favored in the law and cannot be disinherited by any dubious or ambiguous words. This rule is well settled and is laid down in many adjudicated cases. We find it concisely and clearly stated in 30 A. & E. Enc. Law, 2d ed., 668, as follows:

"Where any ambiguity exists in a will, it is a well established rule of construction that the law favors the heir in preference to one not so nearly related by blood or not related at all. Thus, heirs at law are not to be disinherited by conjecture but only by express words or by necessary implication. Mere negative words will not suffice, but there must be an actual disposition of the estate to some other person."

In our opinion, however, no ambiguity exists in the will of the testator here, and in the view we take there has been an actual disposition of the estate to other persons, who are more nearly related by blood than is appellant. Testator had the right to leave appellant unprovided for in his will, without reason. We are not called upon to conjecture why he adopted that course. He did not make appellant a legatee, nor did he make a bequest to his mother. He may have given appellant's mother in her lifetime what he intended for her share. Be this, however, as it may, he has left appellant unprovided for by his will and we cannot amend it.

In support of his contention that the testator understood the use of the word "children" to include *issue*, the child of a deceased child, counsel for appellant devote a considerable portion of their brief to a discussion of early Hawaiian statutes concerning the descent and distribution of property, and decisions under those statutes; and rely most strongly on the recent case of *Kahananui v. Maunakea*, 20 Haw. 114, where this court, in an opinion written by the

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testator while a member of the court, in construing a statute, held that the word "children," as there used, included "grandchildren." This decision, in our opinion, is of no value in ascertaining the intent of the testator as to the meaning of the word "children" as used in his will. It is only entitled to weight as a judicial precedent, laying down what we conceive to be sound rules of construction, and the fact that the opinion was written by Judge Hartwell entitles it to no more consideration in the case at bar than if the opinion had been written by another member of the court, of which the testator was a member, and concurred in by him. A careful reading of the case convinces us that it is not here in point, and analyzing the reasoning there employed and the authorities cited, we are satisfied that Judge Hartwell had in mind, and was fully cognizant of, the rule that the word "children," when used in a will, in its primary and usual signification, means descendants of the first generation. The language of the statute then under consideration brought it fairly within the exceptions hereinabove adverted to, and in our opinion the views expressed in the *Kahananui* case detract from, rather than add to, the force of the contentions here advanced by appellant.

There is nothing in the language of this will nor in the circumstances surrounding the parties at the time of its making that would justify us in withdrawing it from the operation of the general rule as to the meaning of the language therein used.

The decree appealed from is affirmed.

Stanley & Wilder for the executor filed no brief.

R. B. Anderson (*Frear, Prosser, Anderson & Marx* on the brief) for the claimants under the will other than Charles H. Chater, a minor.

D. L. Withington (*Castle & Withington* on the brief) for Charles H. Chater, a minor.

Syllabus.

CHONG YET YOU AND CHEW SAI, ALIAS SAM
KEE *v.* CHARLES H. ROSE.

No. 921.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

SUMMITTED MARCH 24, 1916.

DECIDED APRIL 3, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—*construction—reason and spirit—implication.*

In case of incompleteness or ambiguity of expression the reason and spirit of the statute should be considered. That which is necessarily or plainly implied in a statute is as much a part of it as that which is expressed.

SALES—*fraudulent conveyances—retention of possession by vendor.*

Under Sec. 3120, R. L. 1915, a sale of personal property is void as to creditors of the vendor where there is no delivery and change of possession of the property, and the evidence of the sale is not recorded.

REPLEVIN—*attached property.*

It is a good defense to an action of replevin against a sheriff that he holds the property by virtue of a valid writ of attachment against a third party who is the real owner.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an action of replevin in which the defendant obtained judgment in the circuit court, jury waived, and is brought to this court upon the plaintiffs' exceptions to the decision and the overruling of their motion for a new trial. The case was tried upon agreed facts. The plaintiffs purchased a refrigerator from one Fong Lan on September 13, 1915; at the request of the vendor, acceded to by the vendee, the refrigerator was to remain in the possession of the former for a few days; a bill of sale was executed but not

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recorded; and on September 14, the defendant, as sheriff of Honolulu, took the refrigerator from the possession of Fong Lan under a writ of attachment issued in an action of assumpsit brought against Fong Lan by another, the validity of which writ has not been questioned. The plaintiffs contend that the decision of the circuit court was contrary to the law and the facts.

Section 3120 of the Revised Laws, 1915, provides that "Every mortgage or other conveyance of personal property, not accompanied by immediate possession and followed by an actual and continued change of possession of the things mortgaged or conveyed, shall be void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees, in good faith and for a valuable consideration, unless such mortgage or other conveyance shall be recorded in the office of the registrar of conveyances." By section 2381 of the Revised Laws of 1905, it was provided that chattel mortgages, as well as certain other instruments, in order to bind third parties to their detriment, should be recorded in the office of the registrar of conveyances. (R. L. 1915, Sec. 3119.) Bills of sale were not included. In 1911 the legislature amended that section by eliminating reference to chattel mortgages and enacted a new section which has become section 3120 of the last revision as above quoted. (S. L. 1911, Chap. 20.) The evident intent of the legislature was to put chattel mortgages and bills of sale upon the same footing and to require their recordation unless there was an actual and continued change of possession of the property mortgaged or sold, by way of protection against fraud upon creditors and subsequent mortgagees of, and *bona fide* purchasers from, the vendor or mortgagor, as the case might be. Has the intention been sufficiently expressed? The statute says "shall be void against creditors of the mortgagor." What as to the creditors of the vendor? The statute also says "as against

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subsequent purchasers or mortgagees" without mentioning from or of whom. Here, by necessary implication to avoid absurdity and incongruity, the words "from or of the vendor or mortgagor" are to be implied. And we think by like implication, and in order to carry out the manifest intent of the legislature, creditors of a vendor must be held to be equally protected with creditors of a mortgagor though they are not expressly mentioned. If the words "of the mortgagor" did not appear there would be very little difficulty, and we think the presence of those words should not change the construction. Statutes designed to protect creditors against fraud are liberally construed. 20 Cyc. 344. The intention of the legislature is to be looked for first in the language used in the statute, and unless that language, if taken literally, would lead to injustice, inconvenience, repugnancy or absurdity, it will be given its ordinary meaning and usual effect. *In re Inter-Island Steam Nav. Co.*, 21 Haw. 6; *Lake County v. Rollins*, 130 U. S. 662, 670. But in case of incompleteness or ambiguity of expression the reason and spirit of the statute and the cause which induced the legislature to enact it should be considered in interpreting it. R. L. 1915, Sec. 12; *Shaw v. Boyd*, 19 Haw. 83. And in this connection the rule is that whatever is necessarily or plainly implied in a statute is as much a part of it as that which is expressed. 36 Cyc. 1112; *Telegraph Co. v. Eyser*, 19 Wall. 419, 427; *Hill v. American Surety Co.*, 200 U. S. 197, 203; *Gilbert v. Craddock*, 67 Kan. 346; *State v. Phelps*, 144 Wis. 1, 8; *State v. Blair*, 235 Mo. 680, 697. This has been assumed to be the rule in a number of cases in this jurisdiction. In the case of *In re Lightfoot*, 22 Haw. 293, 297, this court said "Statutory construction permits the implication of words apparently intended for the purpose of upholding and giving force to the legislative will, but does not authorize the interpolation of conditions into a statute—additional

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terms—not found in the statute considered as a whole.” See *Territory v. Palai*, ante p. 133. There is a difference between drawing plain inferences and making necessary implications, based on the context, reason and spirit of an act, on the one hand, and supplying material omissions and interpolating additional provisions, on the other. One is permissible, the other not.

We hold, therefore, that though as between the parties to the transaction, delivery of personal property is not necessary in order to pass title upon a sale of the property, yet under the statute a sale not accompanied with delivery and followed by a continued change of possession of the property is void as to creditors of as well as subsequent *bona fide* purchasers from the vendor unless the evidence of the sale be put of record. See *Prather v. Parker*, 24 Ia. 26; *Smith v. Champney*, 50 Ia. 174. The contention of plaintiffs’ counsel that the defendant was a mere trespasser and unable to justify under the writ is based on the mistaken view that the refrigerator belonged to the plaintiffs as against all persons. “It is a good defense to an action of replevin that the property was taken by the defendant by virtue of a writ of attachment in his hands as sheriff against a third party who is the real owner.” Cobbey on Replevin, Sec. 804. The cases of *Wright v. Brown*, 11 Haw 401, and *Lazarus v. Carter*, id. 541, cited in the plaintiffs’ brief, are not at all in point because, among other reasons, they were decided before the passage of the act of 1911 above referred to.

The exceptions are overruled.

J. T. DeBolt for plaintiffs.

J. Lightfoot for defendant.

Syllabus.

IN RE HARRY T. MILLS.

No. 130.

PETITION FOR REINSTATEMENT.

ARGUED MARCH 28, 1916.

DECIDED APRIL 5, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

ATTORNEY AND CLIENT—*disbarment—reinstatement.*

On an application for reinstatement by a disbarred attorney it must be made to appear that the applicant has accepted and fully acquiesced in the judgment of disbarment, and where, by the applicant's own showing, it appears that he has not fully acquiesced in such judgment, his petition for reinstatement will be denied.

Per curiam: This is a petition of Harry T. Mills praying this court to set aside its judgment of disbarment rendered against him at its October term, 1905. The petition sets forth that petitioner was admitted as a member of the bar of this court on the 16th day of January, 1905; that on or about the 22d day of June, 1906, as the result of a trial upon certain charges which had been theretofore made to this court against petitioner a judgment was entered in and by this court whereby petitioner was disbarred and his name stricken from the roll of attorneys and counsellors at law in the courts of the Territory of Hawaii. As grounds why he should now be reinstated, it is alleged "That during nine years last past, or thereabouts, this petitioner has resided in the said County of Honolulu and has demeaned himself as a lawabiding and respectable citizen; that petitioner feels that his exclusion from the bar and from the privileges appertaining to membership thereof, including the opportunity to earn a livelihood in the practice of his profession, during almost ten years last past, has been and is sufficient punishment for any wrong that he may have committed

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and in respect of which said judgment of disbarment was pronounced." These are the only grounds for relief set forth in his petition. In support of his petition, endorsed thereon and attached thereto, he has filed a recommendation signed by a majority of the members of the bar of this court residing in the first judicial circuit and by the three judges of the circuit court of the first judicial circuit, in the following language: "We, the undersigned, being members of the bar of the supreme court of the Territory of Hawaii, hereby respectfully recommend that the foregoing petition be granted." The petition of Mr. Mills, as well as the recommendation of the bar, so numerously signed, deserve and have received our careful consideration. We do not deem it necessary to review the proceedings in the action for disbarment. They are fully stated in the opinion of the court *In re Mills*, 17 Haw. 564. In the present proceeding the propriety and justice of the judgment of disbarment are not questioned, nor for that matter, are they admitted by the applicant, the petition somewhat evasively stating that the punishment he has undergone "during almost ten years last past, has been and is sufficient punishment for any wrong *that he may have committed*, and in respect of which said judgment of disbarment was pronounced." In passing upon the application for reinstatement the court will presume that everything stated in the opinion of the court in the disbarment proceeding was justified by the evidence (*Danforth v. Egan*, 119 N. W. 1021).

As to the correct practice in the matter of making application for reinstatement, and as to the contents of the application, whether in the form of a motion or a petition, we are in thorough accord with the views expressed by the supreme court of Ohio *In re Disbarment of Thatcher*, 83 Ohio St. 246, 248, where the following appears:

"Having been removed from the bar he may, in accordance with what we conceive to be correct practice, file a

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written motion expressly accepting the judgment of the court as to ethical requirements, and offering such reasons as he may have for the conclusion that his reinstatement is justified by the considerations upon which a select few of the masses of the citizens of the state are permitted to enter and remain at the bar to participate in the high function of administering justice."

But here, however, as did the court in the *Thatcher* case, we will accept the petition in that respect as sufficient.

After the filing of the petition the court called upon Mr. Mills to make a statement as to what extent, if at all, he had engaged in the practice of law since the entry of the judgment of disbarment. From the statement of the applicant it appears that for something less than a year after the entry of the judgment of disbarment he resided in Kona, Hawaii, and did not engage in any business or occupation; that for approximately nine years last past he has been conducting a collection business at Honolulu and taking assignments of claims to himself, upon which, in many instances, he brought suits in his own name in the various courts of the Territory. In these actions upon such assigned claims petitioner drew the pleadings, appeared in court in his own behalf, examined witnesses and had general charge of the cases to judgment and execution. Some of the claims upon which actions were instituted as aforesaid petitioner purchased outright; others he took assignments of upon the payment of a nominal consideration, under an agreement with his assignor that if he recovered the money from the debtor, by suit or otherwise, he would pay a stated cash sum or a percentage of the amount collected to the assignor, that if no money was collected from the debtor no payment was to be made to his assignor other than the nominal sum paid at the time of the assignment. Petitioner paid all the costs and expenses of suits brought by him, and contends that he was the absolute owner of all the claims upon which he

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brought suit, whether acquired by absolute purchase or in the manner last above described; that he had a right to appear in his own behalf and prosecute all of these claims and that such appearance on his part was not in disobedience of the judgment of disbarment entered against him. In support of this position petitioner cites the case of *Philbrook v. Superior Court*, 111 Cal. 31. We make no question of petitioner's right to appear in his own behalf and prosecute to judgment the claims purchased by him outright *in good faith*, but as to the second class of claims—those that were assigned to petitioner under an agreement back that he would undertake the collection of same and if successful pay to the assignor a stated sum or an agreed proportion of the amount collected—we hold the view that such transactions constituted an evasion of the judgment of disbarment and amounted to nothing more nor less than the appearance in court of petitioner as an attorney upon a contingent fee. We think this view is in thorough accord with the holding of the court in the *Philbrook* case *supra*, where, on page 35, the court said: The duty of the trial court "is not alone to determine whether or not the transfer is such as will protect the defendant, but equally to determine whether the transfer be genuine or simulated to evade the judgment of this court." See also *Cobb v. Judge of Superior Court*, 43 Mich. 289. While it may be true that under the assignment petitioner took the legal title to the claim and could prosecute the same under statutes which exist in many of the code States providing that actions shall be brought by the real party in interest, there can be no doubt but that the assignor was the equitable owner of the claim or at least a portion of the proceeds that might be collected thereunder. This, to our minds, is the test as to whether petitioner was the owner in good faith of this class of claims, within the meaning of the *Philbrook* case.

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It further appeared from the statement of petitioner, made to the court, that he would be unable to comply with the requirements of the existing supreme court rule relative to the qualifications for admission to practice as an original applicant. Authorities are not lacking to the effect that a petition for reinstatement should not only set forth the facts touching the proceedings in disbarment, with reasons why the petitioner should be reinstated, but should also in all respects comply with the rules applicable to the admission of candidates to practice law in the first instance; that the status of a disbarred attorney is the same as that of one who has never been admitted to practice (*In re Newton*, 27 Mont. 182; *In re Boone*, 90 Fed. 793; *State v. Swan*, 60 Kan. 461, 56 Pac. 750; *Danforth v. Egan*, 119 N. W. 1021.

In the view that we entertain, that the petitioner has not fully acquiesced in the judgment of disbarment since the same was pronounced against him, it will be unnecessary for us to pass upon the question of his qualifications under the present rule of court, this being a matter which we believe may properly be made the subject of a rule of court as applicable to cases which may possibly arise in the future.

Upon the presentation of the petition counsel for petitioner argued that the only question involved was whether petitioner had been sufficiently punished. With this view we are not in accord.

"On an application for reinstatement by one who has been removed from the bar, the sole question to be determined is whether the granting of his application would probably be promotive of the right administration of justice." *Disbarment of Thatcher*, 83 Ohio St. 246.

In the disbarment proceeding the punishment of the attorney was neither involved nor considered. *In re Thatcher, supra*, 246, 248. A statement in the petition, as the sole ground why the applicant should be reinstated,

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that in his (the applicant's) opinion he has been sufficiently punished, which opinion is presumably shared by the attorneys who recommend petitioner's reinstatement (although the attorneys, in endorsing the petition and recommending the granting thereof, assign no reasons therefor), is not sufficient. *In re Enright*, 69 Vt. 317, 37 Atl. 1046; *In re Pemberton* (Mont.), 63 Pac. 1043. The rule applicable to the reinstatement of disbarred attorneys is well stated in 2 R. C. L. 1114, as follows:

"Whether or not the applicant shall be reinstated appears to be a matter left to a great extent to the sound discretion of the court. The action of the court on such application will, generally speaking, depend on whether or not the court decides that the public interest, in the orderly and impartial administration of justice, will be conserved by the applicant's participation therein in the capacity of an attorney or counsellor at law, and the character of the act leading to an attorney's disbarment is also a large factor in determining whether he should be reinstated."

Holding, as we do, that petitioner has not fully acquiesced in the judgment of this court disbarring him, but that, on the contrary, by his own showing, he has evaded the same, we deny the petition.

Petition denied.

J. W. Cathcart and *L. Andrews* for petitioner.

I. M. Stainback, Attorney General, *amicus curiae*.

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TERRITORY *v.* W. H. FIELD.

No. 926.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

ARGUED APRIL 3, 1916.

. DECIDED APRIL 7, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*void judgment.*

The supreme court of this Territory will entertain an appeal to set aside a void judgment of a district court.

CONSTITUTIONAL LAW—*statutes—right to question constitutionality of a statute.*

A question of the supposed conflict of a statutory provision with the Constitution will not be considered at the instance of one whose rights do not appear to be affected by such provision.

MUNICIPAL CORPORATIONS—*police power—ordinances—automobiles.*

Certain provisions of ordinance No. 31 of the County of Maui, relating to the registration of motor vehicles and the certification of chauffeurs held not to constitute a prohibition of the operation of motor vehicles upon the highways but reasonable regulations made in the exercise of the police power.

OPINION OF THE COURT BY ROBERTSON, C. J.

The defendant was charged in the district court of Wailuku, county of Maui, with violating the provisions of ordinance No. 31 of that county by operating upon the public highway a motor car without having obtained a chauffeur's certificate authorizing him so to do. A demurrer to the charge on several grounds was overruled, and, upon the close of the evidence, a motion to discharge the defendant was denied. Upon uncontradicted evidence in support of the charge the defendant was found guilty, the only defense attempted to be made on the facts being that the defendant was possessed of a chauffeur's certifi-

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cate which had been issued to him on September 10, 1910, under an ordinance passed on October 4, 1906, which was repealed by an ordinance passed on April 11, 1913, and which, in turn, was repealed by the present ordinance No. 31, which went into effect on January 1, 1916. The defendant appealed from the judgment upon points of law, and his counsel have limited their contention in this court to questions touching the validity of the ordinance.

The county attorney contends that as the courts of record of this Territory have power under section 2246 of the Revised Laws "to decide the constitutionality and binding effect of any law, ordinance," etc. inferentially the district courts, which are not courts of record, have no such power. From this he argues that this court ought not to consider this appeal upon its merits but should dismiss it. But even if the district courts have no power to pass upon the constitutionality of statutes or ordinances, a thing we are unable to concede, yet, in this case, if the ordinance in question is invalid because violative of constitutional inhibitions and the appellant is in position to complain thereof, the ordinance would be declared a nullity by this court, and the judgment below being void it could be reversed on this appeal. This court will entertain an appeal to set aside a void judgment of a district court. *Lewers & Cooke v. Redhouse*, 14 Haw. 290, 294; *Gear v. Henry*, 21 Haw. 101, 104. Another reason why this appeal should not be dismissed lies in the fact that all the grounds upon which it is contended the ordinance is invalid do not involve the Constitution.

The contention of the appellant was and is that the ordinance is null and void because (1) it is unreasonable and arbitrary and denies to certain persons the equal protection of the laws by discriminating against certain citizens desirous of securing chauffeurs' certificates in order to drive for public hire; (2) it denies to persons under the

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age of twenty years, and regardless of their fitness and qualification, the right or privilege of securing chauffeurs' certificates to drive automobiles in public service for hire; (3) it does not equally affect all persons under the age of twenty years who may hold or apply for certificates since those who possessed certificates prior to the passage of the ordinance are not required to obtain new certificates; (4) it invests an arbitrary discretion in the examiner of chauffeurs in the matter of the granting or refusing to grant to applicants therefor permanent chauffeurs' certificates; (5) it empowers the examiner to revoke and cancel temporary chauffeurs' certificates without a hearing and without the right of appeal from his decision; and (6) it vests in the examiner of chauffeurs judicial powers and functions.

Ordinance 31 is a comprehensive enactment comprising twenty-seven sections entitled "An ordinance relating to the registration, use and operation of motor cars, and the examinations and qualifications of chauffeurs and drivers thereof, and creating an office to be known as the examiner of chauffeurs and inspector of automobiles for the county of Maui," and repealing prior and conflicting ordinances. The scope of the ordinance is reflected in its title. The argument is that certain of its provisions are open to the objections above enumerated, that they conflict with the provisions of the 5th and 14th Amendments of the Constitution in regard to "due process of law" and "the equal protection of the laws," and are "unconstitutional" generally. We deem it unnecessary to examine the several sections of the ordinance at which the various objections are directed to ascertain whether any of the objections are well founded since it does not appear that any of the alleged invalid provisions affect the appellant or have operated to his disadvantage in any way. The appellant does not contend that he desires a certificate to enable him to drive a motor vehicle for public hire, or that he is under the age

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of twenty years, or that he has been arbitrarily refused a certificate, or that he has a certificate which has been or is about to be arbitrarily revoked by the examiner, or that the examiner has exercised judicial functions to his detriment. It is well settled that a question of the supposed conflict of a statutory provision with the Constitution will not be considered at the instance of one whose rights do not appear to be affected by such provision. This has so often been held in this jurisdiction, as well as in others, that we are surprised at being obliged to reiterate the rule. See *The King v. Young Tang*, 7 Haw. 49; *Territory v. Hoy Chong*, 21 Haw. 39; *Wilder v. Colburn*, 21 Haw. 701; *Territory v. McVeagh*, ante p. 176, and cases there cited.

On behalf of the appellant it is further contended that the requirements of the ordinance in question amount to a prohibition of the operation of automobiles upon the public highways in the county of Maui, whereas the power conferred upon the county in this connection is merely to regulate. We hold that the scope of the ordinance constitutes regulation and not prohibition. In order to obtain the necessary certificate the ordinance requires that the applicant shall make application in writing "setting forth the name, sex, nationality, occupation and place of residence of applicant, the amount and nature of experience the applicant has had in operating, and places where he has operated, motor cars; designating in said application the kind of motor car, and motive power thereof, for the running of which applicant desires to secure a chauffeur's certificate, and whether or not a certificate is desired entitling the applicant to operate a car in the public service for hire" (Sec. 7); and that he "must have attained the age of seventeen years, must be familiar with the terms of this ordinance, and must have proven to the satisfaction of the examiner of chauffeurs that he is competent to operate

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the type or types of cars for which application to operate is made; provided that any applicant desiring to operate a car in the public service for hire must have attained the age of twenty years and must have passed a special examination," etc. (Sec. 9); and shall pay a fee of one dollar for registering the vehicle (Sec. 24) and a fee of three dollars for the chauffeur's certificate (Sec. 25). Clearly, such provisions do not constitute a prohibition of the driving of motor vehicles upon the highways. They are reasonable regulations made in the exercise of the police power. See *Territory v. Schaefer*, 19 Haw. 214; *People v. Schneider*, 139 Mich. 673; *Unwen v. State*, 73 N. J. L. 529; 75 N. J. L. 500; *Com. v. Boyd*, 188 Mass. 79.

The judgment appealed from is affirmed.

E. R. Bevins, County Attorney of Maui, for the Territory.

D. H. Case (*E. Vincent* with him on the brief) for the defendant.

FUKUI OTOKICHI *v.* NAKAMURA SEKIJIRO,
DEFENDANT, FIRST BANK OF HILO, LIMITED,
GARNISHEE.

No. 915.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

SUBMITTED MARCH 28, 1916.

DECIDED APRIL 11, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PLEADING—*demurrer*—*statute of limitations*.

In an action at law where the complaint shows on its face that the cause of action is barred by the statute of limitations the

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bar of the statute may be pleaded by demurrer, in which case the demurrer should be sustained.

LIMITATION OF ACTIONS—*directed verdict.*

The plaintiff's complaint showed *prima facie* that the cause of action sued on was barred by the statute of limitations; a demurrer to the complaint on that ground was overruled; the defendant pleaded the general issue, and, no rule of court requiring him to plead the statute, gave notice in his answer that he would rely on the bar of the statute as a defense; plaintiff at the trial introduced evidence proving his case as alleged but offered no evidence tending to prove any fact taking the case out of the operation of the statute: Held, that the trial court properly directed the jury to find a verdict for the defendant.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff in error commenced this action in assumpsit in the circuit court of the fourth circuit June 28, 1915, to recover upon a promissory note executed to him December 23, 1903, by the defendant for \$200 due May 26, 1904, with interest from date, alleging that said note "together with interest, is due, owing and wholly unpaid." The complaint contained no allegation of acknowledgment by partial payment or otherwise or of any new promise to pay the debt made within six years prior to the commencement of the action. Nor did the complaint allege any fact showing that the operation of the statute had been suspended or the bar thereof removed. To the complaint defendant demurred upon the ground that "said declaration does not state a cause of action in favor of plaintiff and against defendant for the reason that it shows upon its face the note therein sued upon is barred by the statute of limitations." The plaintiff moved to strike the demurrer from the files, which motion was denied. The circuit court overruled the demurrer and the defendant filed his answer of general denial, giving notice therein that he would rely, among other defenses, at the trial, upon the statute of

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limitations. The cause was tried before the court and a jury, the plaintiff proving the note as alleged and that no part thereof had been paid to him. Thereupon the defendant moved for a directed verdict upon the ground that the note was barred by the statute of limitations and the plaintiff had offered no evidence showing a removal of the bar of the statute, which motion was granted, and the jury, under the direction of the court, found in favor of the defendant. To review the judgment entered on the said verdict the plaintiff has sued out a writ of error in this court. The plaintiff assigns four errors, the first three of which challenge the action of the trial court in directing a verdict in favor of the defendant, the verdict and judgment thereon, all of which will be treated generally. The last error assigned challenges the correctness of an item in defendant's cost bill which was taxed and is a part of the judgment.

The first three errors assigned are based upon the idea that the defendant did not plead the bar of the statute of limitations, for which reason he should have been held to have waived the same, and plaintiff was entitled to a verdict and judgment on the evidence proving the allegations of his complaint. The trial court should have sustained the demurrer, the complaint showing on its face that the cause of action was barred by the statute of limitations. This case comes within the rule laid down in *Silverhorn v. Ins. Co.*, ante 160, so far as the procedure is concerned. In the *Silverhorn* case we held that the common law rule requiring the defense of the statute of limitations to be pleaded by special plea in bar had been changed by our civil procedure act, under which the bar of limitations may be pleaded in a demurrer when the allegations of the complaint show on its face that the action is barred. We there held that the demurrer setting up the defense of limitations is, under our civil procedure act, tantamount to a

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special plea. This case arose in the first judicial circuit in which there is a rule of court requiring that "in personal actions the statute of limitations shall be specially pleaded." Under our civil procedure act (Ch. 137, R. L.) issues of law are raised by demurrer and issues of fact by denial (Sec. 2360). Whether or not the declaration shows that the cause of action is barred by the statute of limitations is a question of law, and under the wording of the statute mentioned may be presented by demurrer, and when so presented is pleaded by the defendant and not waived by him. In *Harris v. Clark*, 18 Haw. 569, this court strongly inclines to the view that the statute of limitations is prohibitive, or, at least, so favored that in order to remove the bar of the statute it must be shown by unequivocal evidence either that an express promise or an unqualified and direct admission of debt, which the party is liable and willing to pay without accompanying circumstances which repel the presumption, in order to bind the defendant where the statutory time for bringing the action has elapsed. The practice relating to the defense here involved has been adverted to in former decisions of this court to which we now refer.

In *Pahia v. Maguil*, 11 Haw. 530, the court held that the statute of limitations must be pleaded where a rule of court so requires. We so held in *Kapela v. Gilliland*, 22 Haw. 655, where the defense of limitations was attempted to be raised by motion for nonsuit in the first instance. The defense is a personal one and if not relied on will be considered waived (*Norris v. deHerblay*, 9 Haw. 514, 566; *Dillingham v. Scott*, 20 Haw. 4; *Borba v. Kaina*, 22 Haw. 721).

In the case at bar the defendant did not waive the bar of the statute but relied upon it; he pleaded it in his demurrer and gave notice in his answer that he would rely upon the bar of the statute as a defense. No formal or

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technical plea of the bar of the statute being required under our civil procedure act, as was required at common law, there is no basis for the claim that the defendant waived the bar of the statute. The rules of the fourth circuit court do not require a plea of the statute, but provide (Rule VII) that if a party attempts to make proof of limitations "without having first pleaded such defense with sufficient particularity to inform the opposite party of the facts relied upon, the said opposite party may in the discretion of the court or judge or upon motion supported by affidavit of surprise, obtain from the court, for the purpose of obtaining further evidence, an order continuing the cause to such time as the court may deem reasonable." No surprise was sprung on the plaintiff in the case at bar. The bar of the statute had been pleaded in the demurrer, and notice given in the answer that it would be relied on. Hence there is no basis for a contention that the defense of the bar of the statute had been waived by the defendant. It is admitted that under the authorities, when the statute of limitations is pleaded by the defendant as a defense, that the burden is upon the plaintiff to reply and to prove that his case, if *prima facie* barred, comes within one of the exceptions taking the case out of the statute.

It is also argued that by pleading the bar of the statute in a demurrer the plaintiff is deprived of the opportunity of replying and showing that his cause of action is taken out of the statute by disability, absence, acknowledgment of the debt as a subsisting obligation, or by a new promise to pay the debt within the time, the running of which would otherwise bar the action. Reflection will show that there is nothing in this contention. Take the case at bar. The allegations of the complaint show *prima facie* that the cause of action was barred by the statute before the action was commenced. The defendant objected to the complaint on this ground, in other words, he pleaded the bar of the

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statute in his demurrer. If the trial court had sustained the demurrer, as it should have done, the plaintiff, if he could, would have been allowed to amend his complaint and allege facts that take his case out of the statute, and at the trial would have had the opportunity of proving the facts showing the removal or suspension of the statute. The plaintiff could not be prejudiced by such a course. He is here complaining, not that the bar of the statute has not been pleaded, but that it has not been pleaded in a certain way. Our civil procedure act was adopted for the purpose of dispensing with the technical common law pleadings, for the purpose of simplifying pleadings and facilitating the making of issues of law and of fact in law actions, and providing (R. L. Sec. 2369) that under the general issue "the defendant may give in evidence, as a defense to any civil action, any matter of law or fact whatever." Under our statute of amendments and jeofails (R. L. Sec. 2371) the contention that by pleading the bar of the statute in a demurrer deprives the plaintiff of the opportunity to reply and to show special facts removing or suspending the running of the bar of the statute is without merit. The contention of plaintiff that having proven the allegations of his complaint, and the defendant having failed to introduce evidence showing that the cause of action was barred, entitled the plaintiff to a judgment without a showing by him of any special fact taking the case out of the operation of the statute, is without merit and presupposes that the defendant should establish by evidence the nonexistence of special facts, the burden of proving which rests upon the plaintiff in the first instance. It was not the duty of the defendant to establish a negative or negatives. The evidence of the plaintiff established that more than six years had elapsed after the maturity of the note sued on before the commencement of the action; it showed that none of the principal or interest had been paid, establishing, infer-

Watson, J., concurring.

entially, that no acknowledgment of the debt as a subsisting liability by partial payment had been made. The plaintiff being the original payee and the defendant the original payor, no presumption of disability arises, and if any presumption is indulged it should be against disability under such circumstances. Apparently, by the evidence and showing of the plaintiff, the bar of the statute had fully run prior to the commencement of the action, hence, having relied upon the defense of the bar of the statute, the defendant was not called on to offer any evidence. There was nothing for him to rebut, hence there was no error in directing the jury to find for the defendant.

The fifth assignment of error is not mentioned in the brief of plaintiff in error, has not been argued by brief or otherwise, for which reason we do not consider it, but regard it as abandoned by the plaintiff in error.

The judgment is affirmed with costs to the defendant in error.

W. H. Smith for plaintiff in error.

W. S. Wise and *H. L. Ross* for defendant in error.

CONCURRING OPINION OF WATSON, J.

I concur in the conclusion that the judgment herein must be affirmed. The rules of the fourth circuit court, unlike those in force in the first circuit, do not require that the statute of limitations shall be specially pleaded (see my concurring opinion in *Silverhorn v. Ins. Co.*, ante 167), and in my opinion an answer of general denial, accompanied by notice that defendant intended to rely upon the bar of the statute of limitations as a defense, was sufficient, under the prevailing rule in the fourth circuit, to cast upon the plaintiff the burden of proving that his case, which by his own showing was *prima facie* barred, was within one of the exceptions taking it out of the statute (*Dielmann v. Citizens' Nat. Bank*, 8 S. D. 263, 66 N. W. 311).

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IN THE MATTER OF THE APPLICATION OF MAKAWIKOLI FOR A WRIT OF HABEAS CORPUS FOR ONE AH FAN.

No. 916.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED APRIL 6, 1916.

DECIDED APRIL 11, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

ADOPTION—*effect of not recording agreement—guardianship.*

An agreement of adoption which was executed before but not recorded until after a guardian had been appointed for the child, held, under R. L. 1915, Sec. 3119, to be ineffective as against the guardian's right to the custody of the child.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an appeal from a judgment of a judge of the first circuit court dismissing a writ of *habeas corpus* previously issued by him upon the petition of one Maka Wikoli. The respondent is one Ah Ping, and the proceeding involves the right to the custody of a boy six or seven years of age named Ah Fan (alias Ah Fon) of whom the petitioner is the maternal grandmother and the respondent a cousin.

The material facts shown by the record are as follows: On June 17, 1913, one C. Ah Chew, the father of the child in question, the mother having previously died, executed at Lahaina, Maui, an instrument claimed to be, and held by the circuit judge to be, an agreement of adoption giving the child to said Ah Ping; the instrument was signed and acknowledged by Ah Chew and Ah Ping, but was not recorded until the 5th day of August, 1915; Ah Ping, a resident of Kipahulu, Maui, had gone to Lahaina at Ah Chew's

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request; Ah Chew died soon after the date of the execution of the agreement; in May, 1915, the petitioner, who lives in Honolulu, went to Kipahulu and found the child in the custody of one Wailehua, who claimed to have a right to its custody, though she did not ascertain the nature of the right claimed; on July 27, 1915, the petitioner was appointed guardian of the person and property of the child by the judge of the circuit court of the second circuit; on August 2 she went again to Kipahulu and finding the child in the custody of the respondent, exhibited to him her letters of guardianship, but he refused to surrender the child; and on August 27 the petitioner applied for and obtained the writ of *habeas corpus*. The whereabouts of the boy between the date of the agreement of adoption and May 1915, when he is shown to have been with Wailehua at Kipahulu, did not appear in evidence. The petitioner claims under her appointment as guardian while the respondent claims under the agreement of adoption.

Counsel for the appellant contends that the agreement of adoption is of no validity as against the appellant because it was not recorded until after her appointment as guardian, under section 3119 of the Revised Laws which provides that "All * * * agreements of adoption shall be recorded in the office of the registrar of conveyances in default of which no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests."

The circuit judge held, and counsel for the respondent claim, that as no property rights are involved the petitioner is not a "third party" within the meaning of the statute. It is also argued that the respondent, by virtue of the adoption, stands in the shoes of the child's father (R. L. 1915, Sec. 2994) and that under section 3018 of the Revised Laws, as between the father and the guardian of an infant, the former is "entitled to the custody of the person of the minor, and to the care of his education."

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"A statutory requirement that instruments of adoption must be recorded is to be regarded as mandatory, and the adoption is not consummated until the instrument is properly recorded." 1 C. J. 1382. In *Abenela v. Kailikole*, 2 Haw. 660, it was held that an unrecorded agreement of adoption was of no validity. But at that time the statute provided that such agreements, unless in writing and duly recorded, "shall be void and of no effect." In *Black v. Castle*, 7 Haw. 273, under a statute similar to the present one, it was held that an adopted child could not take insurance money payable to the "surviving children" of the insurer as the agreement of adoption was not recorded until after the death of the insurer. There property rights of other children had intervened. In *Wright v. Brown*, 11 Haw. 401, 403, a case involving an unrecorded chattel mortgage and decided at a time when such mortgages were included in the statute relating to articles of adoption, it was said that "It is evident that this statute was enacted for the protection of persons who had 'rights' or 'interests' in the property and not for the benefit of mere strangers or trespassers." That case undoubtedly expressed the correct view of the statute with reference to chattel mortgages, but a guardianship involves the right to the custody and control of the ward, as well as possible property rights, and we find no warrant in the statute for holding that a duly appointed guardian is not a "third party" under its provisions when only personal rights are at stake. The statute says that "no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests," and we do not feel at liberty to hold that so far as guardians are concerned the statute is operative only as to property rights or interests. We hold, therefore, that the agreement of adoption in this case was not binding as against the guardian's right to the custody of the child because it was not recorded until after that right had accrued.

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The circuit judge having held that the agreement of adoption was effective against the petitioner, and that the respondent should be regarded as the father of the child, expressed the view that the appointment of the guardian was invalid in the absence of notice to him of the proceeding, citing Woerner, Am. Law of Guardianship, 95, and other authorities. But, as under our view, the agreement of adoption did not have that effect, the respondent was not in the position of a father at the time of the proceeding for the appointment of a guardian, and, hence, was not entitled to notice. "In the absence of any statutory requirement notice is not required to be served on any person." 21 Cyc. 39, and cases there cited. Our statute (R. L. 1915, Chap. 173) contains no requirement as to notice to parents, but as by virtue of section 2993 of the Revised Laws, the father is the natural guardian of the persons and property of his minor children, and as by section 3018 the father, or, if he be dead, the mother while unmarried, is entitled to the custody of the children, presumably he or she would be entitled to notice of a proceeding for the appointment of some one else as guardian over a child of theirs. That is a matter not involved here.

We have assumed that the agreement of adoption in this case is in proper form. There may, perhaps, be room for a contention that it was nothing more than an agreement to adopt the child, the language being, "that the said party of the second part *shall* adopt the said child," etc., but as no point as to this has been made by the appellant we express no opinion upon it.

The judgment appealed from is set aside and the case is remanded to the circuit judge with direction to enter judgment awarding the custody of the child to the petitioner.

W. W. Thayer for petitioner.

R. J. O'Brien (*E. C. Peters* with him on the brief) for respondent.

Syllabus.

H. M. VON HOLT, TRUSTEE UNDER THE WILL OF GODFREY RHODES, DECEASED, v. ADA TREE RHODES WILLIAMSON AND ELLEN TREE WILLIAMSON, A MINOR.

No. 903.

MOTIONS FOR ALLOWANCE OF ATTORNEYS' FEES.

ARGUED MARCH 27, 1916.

DECIDED APRIL 12, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

TRUSTS—allowance of attorneys' fees.

Where in a controversy over the income of the corpus of a trust estate it is adjudged that such income is a separate trust arising by operation of law in favor of one of the claimants, costs and expenses of such claimants, including attorneys' fees, incurred in a suit to settle such controversy, are not allowable out of the principal or corpus of the trust estate.

SAME—same.

An unsuccessful claimant to a certain fund of a trust estate is not entitled to costs and expenses, including attorneys' fees, out of the corpus of the trust estate.

Per curiam: In the decision in this case (*ante* p. 201) we held that the income arising from the trust estate created by the will of the testator Rhodes constitutes a resulting trust, by operation of law, in favor of Ada Tree Rhodes Williamson, the daughter of said testator, and that she is entitled to the whole of the said income as against her infant daughter, the residuary beneficiary. The attorneys for Mrs. Williamson now move the court to allow them a reasonable fee for their services rendered in this case, the same to be paid out of the principal of the trust estate. The attorneys for Ellen Tree Williamson, the infant, who appeared by her father as natural guardian, also move for

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the allowance to them of a reasonable fee for their services in this behalf, the same to be paid out of the principal of the trust estate. It is suggested that this cause, submitted upon agreed statement of facts, may be treated as a bill in equity by the trustee for directions as to the application of the said income, and therefore that the attorneys' fees asked for should be allowed out of the corpus of the trust estate. It might well be suggested also that this is a friendly controversy between the daughter and granddaughter as to which of them the said income shall go during the life of the daughter, Mrs. Williamson, and that the trustee appears as a disinterested party, taking sides neither with the mother nor the infant, and that the controversy does not involve the principal trust. Counsel contend that the will of the testator being ambiguous and requiring construction, that the cost and expense of procuring such should rest upon the body of the estate and not upon the particular trust fund here involved. Under the decision in this case the income of necessity must be considered as a fund separate from the corpus of the trust property. Some authority has been cited to the effect that in case a testator who by will creates a trust and does so in such an uncertain and ambiguous way as to require a construction of his will, that the principal of the trust estate should bear the expenses of so doing. We are cited to a few authorities to support the contention of the movants. In *Howland v. Green*, 108 Mass. 277, 283, there was a bill by trustees for instructions whether certain taxes should be paid out of the corpus or residuary estate, and the controversy was settled by compromise wherein the specific legacies were to be paid in full. Nothing is said in that decision about attorneys' fees, the court holding that the taxes and costs should be borne by the principal fund. In *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 145, the question was whether dividends of a corporation that were paid in new certificates of stock represented capital or

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income. In that case such stock was held to be income, and the costs, without mentioning attorneys' fees, were ordered to be paid out of the principal of the fund. In *Chipman v. Montgomery*, 4 Hun 739, the bill was dismissed without cost to either party. In *Wood v. Vandenberg*, 6 Paige 277, the costs of executors for bringing a proper suit for construction of the will and the costs of guardians *ad litem* of infant defendants were ordered paid out of funds in the hands of the executors, no special mention being made as to attorneys' fees. In *Sawyer v. Baldwin*, 20 Pick. 378, a bill was filed to recover a particular legacy, the suit being necessary by reason of an ambiguity in the will, and which affected the entire trust estate. The court there held that the cost should be borne by the whole estate and not by any class of legatees. In *Monks v. Monks*, 7 Allen 401, a bill was filed by trustees for instructions, and in closing the decision the court said: "The cost of suit, including the necessary fees of counsel, are to be taxed and paid by the executors, and charged in their account as part of the expenses of the administration of the estate." Under the facts of that case, as we view them, the costs were evidently paid out of the income and not the corpus of the estate.

In our opinion this is a controversy in regard to a trust separate from the principal trust, and the attorneys' fees which we are asked to allow are not payable out of the principal trust or corpus of the estate. In *Grimball v. Cruse*, 70 Ala. 534, it was held that the attorneys' fees for services rendered a claimant are not chargeable to the trust estate. There is more reason for holding that this rule should apply to an unsuccessful claimant, as is the case of the infant, Ellen Tree Williamson, than where the claimant is successful. In *Floyd v. Davis*, 98 Cal. 591, the rule is announced that services rendered for the benefit of a certain fund, if allowed, should be charged to that fund, and that in a contest between various trusts created by a will each

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particular trust should be charged with its own attorneys' fees, which should not be charged to the residuary estate. In 2 Perry on Trusts (6th ed) Sec. 903a, we find the rule contended for by the movants, as well as the rule which we think applicable here, stated as follows: "And further, if the testator or his settlor has himself created the difficulty by the form of his expressions, it is equitable that his general estate should pay for clearing up the doubts raised by his own language. But where a legacy has been severed from the general estate, and after it is so severed it takes the subject of a suit by the result of which the general estate will not be at all affected, the costs of the suit must be borne by the particular fund concerning which the suit arose."

For the reasons above given the motion of counsel for Mrs. Williamson to allow them an attorney's fee out of the corpus of the estate is denied.

As to counsel for the infant, appearing by her father as natural guardian, unsuccessfully, we hold that their fees are not payable out of the corpus of the trust estate. In *Hobbs v. McLean*, 117 U. S. 567, the court lays down the rule that the litigation must be in advancement of, and not in opposition to, the interest of all the beneficiaries or no allowance of counsels' fees out of the trust fund will be made. The rule is well established that where one beneficiary successfully maintains an action to recover or preserve the trust property for the benefit of all the beneficiaries under circumstances which would have entitled the trustee to reimbursement had he brought the suit, costs and expenses may be allowed such beneficiary out of the principal of the trust fund (*Seibert v. Minneapolis etc. R. Co.*, 58 Minn. 58; *Drake v. Crane*, 66 Mo. App. 495; *Florida Internal Imp. Fund v. Greenough*, 105, U. S. 527). It is well established that fees of counsel for a litigant whose interest is contingent cannot be allowed out of the trust

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fund (*Union Ins. Co. v. VanRensselaer*, 4 Paige 87; *Gott v. Cook*, 7 Paige 521, 544; and *Matter of Application of Holden*, 126 N. Y. 587, where many authorities are reviewed).

We are cited to the case of *Fitchie v. Brown*, 19 Haw. 415, as establishing a rule authorizing the payment of the fees of counsel to the various claimants in this case out of the corpus of the trust estate. That decision shows that it was regarded as an exceptional case, the court saying: "In a contest concerning the construction of a will it is only under exceptional circumstances that the estate of a decedent should bear the expenses of an unsuccessful appeal from a decree of this court. * * * The question involved in their appeal, however, was novel and important and the amount involved was very large." The rules and authorities relating to the allowance of counsels' fees out of trust funds are not there discussed nor considered. We do not consider the decision in that case as an authority generally for the payment of counsels' fees for diverse claimants to a particular fund out of the principal trust fund, and, therefore, as not controlling here.

The motion of counsel for Ellen Tree Williamson, the said infant, for the allowance of attorneys' fees out of the corpus of the trust estate, is denied.

Frear, Prosser, Anderson & Marx for the trustee.

Holmes & Olson and *Lindsay & Lymer* for movants.

Syllabus.

IN THE MATTER OF THE APPLICATION OF O. A.
STEVEN FOR A WRIT OF HABEAS CORPUS.

No. 943.

ORIGINAL.

ARGUED APRIL 14, 15, 1916.

DECIDED APRIL 22, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CRIMINAL LAW—*warrant of arrest,—jurisdiction of person.*

A warrant of arrest in a criminal case is the writ or process by the service of which upon the accused the court acquires jurisdiction of his person. But the issuance of a warrant, or the service of a valid warrant, may be waived and jurisdiction of the person conferred by a general appearance and plea to the charge.

INDICTMENT AND INFORMATION—*verification of information—constitutional law.*

The Fourth Amendment does not require that an information be verified or supported by affidavit except as it is used as the basis for the issuance of a warrant. As a charge or accusation, in the absence of statute, an information may be presented and filed by a public prosecuting officer upon his official oath.

OPINION OF THE COURT BY ROBERTSON, C.J.

In response to a writ of *habeas corpus* which was issued April 11, 1916, upon the petition of one O. A. Steven, wherein it was alleged that the petitioner was being unjustly and illegally imprisoned and restrained of his liberty by Charles H. Rose, sheriff of the city and county of Honolulu, the respondent filed a return showing, *inter alia*, that, at the time of the issuance of this writ, he held the petitioner in custody under and by virtue of four certain warrants of arrest issued on March 11, by the first judge of the circuit court of the first circuit, for the apprehension of said Steven upon a corresponding number of informations filed

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in the circuit court of the first circuit by William T. Carden, deputy city and county attorney of Honolulu, charging said Steven with the commission of certain misdemeanors.

It is contended, in support of the writ, that the circuit court is without jurisdiction to try the petitioner upon said informations, or any of them, because (1) the informations, which were used as the basis, and the only basis, for the warrants, were not supported by the oath of any person deposing to the truth of the facts alleged therein, and, hence, the warrants were issued without probable cause, and (2) because the petitioner cannot legally be put upon trial upon an information not so verified.

It will be assumed for the purposes of this opinion that the informations in question were presented and filed merely upon the official oath of the public prosecutor, and, therefore, were insufficient foundation for the warrants. The first question to be considered is whether, if the warrants were issued without probable cause, there is such a lack of jurisdiction on the part of the circuit court as would render any subsequent proceedings void. This question is materially affected by certain further facts shown by the return which will now be stated. Immediately after the arrest of Steven on March 11, he was released to bail upon bond, with surety, conditioned for his appearance in court on March 13, "to answer each of said charges;" on said date he appeared accordingly, with counsel, and was arraigned upon the informations; on March 15, he appeared again and entered a plea of not guilty in each case, and the cases were transferred to the docket of the third judge of said court for trial; on March 20, the accused appeared again, and, in open court, waived trial by jury, and the cases were thereafter continued from time to time, being finally set down for trial on April 14. Certain other proceedings were had which alter in no way the effect of those which have been stated. The Fourth Amendment of the Constitution

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provides that "no warrants shall issue but upon probable cause supported by oath or affirmation." This provision guarantees protection against the issuance of warrants not so based and supported. It tends to protect persons from arbitrary and unfounded interference with their personal liberty. A warrant of arrest in a criminal case is the writ or process by the service of which upon the accused the court acquires jurisdiction of his person. But the issuance of a warrant, or the service of a valid warrant, may be waived, and jurisdiction of the person conferred by a general appearance of the accused and plea to the charge. *State v. Dibble*, 59 Conn. 168; *People v. Harris*, 103 Mich. 473; *State v. Brantly*, 20 Mont. 173, 179; *State v. Fitzgerald*, 51 Minn. 534; *Ledgerwood v. State*, 134 Ind. 81, 90; *State v. Mitchell*, 229 Mo. 683, 693. The only case which has been cited to the contrary is *Salter v. State*, 102 Pac. 719, 725, decided by the Oklahoma criminal court of appeals, and that case can hardly be reconciled with the case of *In re Cummings*, 11 Okl. 286, wherein the supreme court, on *habeas corpus*, said, "A verification of a criminal complaint on information and belief is sufficient for every purpose, except merely the issuing of the warrant for the arrest of the defendant, and the objection to the verification must be made by motion to quash the warrant before plea to the merits, or other steps taken which will operate as a waiver of the defect to the verification. * * * By pleading not guilty to the charge contained in the complaint, consenting to a continuance, and agreeing to appear for trial at a future day, the petitioner waived any defect in the verification, and his motion to quash the warrant came too late." We hold, therefore, that by the proceedings had, as set forth in the return of the respondent, the petitioner waived the invalidity of the warrants, if they were invalid, and submitted himself to the jurisdiction of the court.

It remains to be considered whether the circuit court is

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without jurisdiction of the subject matter because the informations were not verified by an oath to the truth of the alleged facts. Our statute (R. L. 1915, Ch. 215) does not require that informations be verified. "At common law an information could be filed by the attorney or solicitor general simply on his oath of office and without verification, and it has been held therefore in this country, that verification of an information by the prosecuting attorney is unnecessary unless required by statute." 22 Cyc. 281. See *Samuel v. People*, 164 Ill. 379, 384; *State v. Kyle*, 166 Mo. 287; *Territory v. Cutinola*, 4 N. M. 305; *State v. Guglielmo*, 46 Ore. 250, 259; *Henson v. State*, 5 Okl. Cr. 201, 205; *State v. Dover*, 9 N. H. 468, 471; *State v. Williams*, 161 S. W. (Ark.) 159. There are cases to the contrary, but we think that the weight of authority, and reason, support the view that an information is regular and sufficient as an instrument of accusation when filed by a public prosecutor upon his official oath and without further verification. This question was carefully considered by the circuit court of appeals for the second circuit in the case of *Weeks v. United States*, 216 Fed. 292. It is there pointed out that when used as the basis for the issuance of a warrant an information should be verified or supported by affidavit in order to show probable cause, but that as the charge or accusation upon which a trial is to be had it is sufficient that it be filed upon the official oath of the prosecuting attorney. Referring to the constitutional provision the court said (p. 302), "If the fourth amendment makes it necessary that, under all circumstances, an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant cannot be sustained. But the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information, by which he is accused of crime, verified by the oath of the prosecuting officer of the government or to have

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it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except 'upon probable cause supported by oath or affirmation' and naming the person against whom it is to issue." We hold that the informations in question, having been filed by the deputy city and county attorney upon his official oath, were duly presented and in proper form as accusations upon which trial may be had. It follows that the circuit court is not without jurisdiction in the premises.

The writ is discharged, and the petitioner, who was admitted to bail pending this proceeding, is remanded to the custody of the respondent.

W. J. Robinson and *C. H. McBride* for petitioner.

W. T. Carden, Second Deputy City and County Attorney, and *J. W. Cathcart*, for respondent.

S. HALAMA *v.* KAILI HALAMA.

No. 925.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

SUBMITTED APRIL 17, 1916.

DECIDED APRIL 26, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*equity procedure—dismissal.*

It is reversible error for a circuit judge, sitting in equity, to dismiss plaintiff's bill during the cross-examination of a witness for the defendant, thereby preventing further cross-examination of such witness, thereby taking from the defendant the opportunity

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of offering further evidence and thereby denying to the plaintiff the opportunity of offering evidence in rebuttal.

EVIDENCE—document not offered—appeal and error.

It is prejudicial error to consider as evidence an entry in a book shown by defendant to a witness for plaintiff on cross-examination, the authenticity of which is disputed, where such book is not identified and introduced in evidence.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff filed his bill in equity alleging that on the 24th day of February, 1913, while he was a minor of the age of nineteen years, he executed and delivered to the defendant, his brother, a quitclaim deed for all his interest in certain lands and personal property situated on the island of Maui; that he did not at the time know the value of the said property conveyed by said deed, but which property was then of the value of \$500; that defendant then knew the value thereof but stated to the plaintiff that it was of the value of \$50, which statement plaintiff believed and relied on owing to the mature years of the defendant and the fact of their relationship; that defendant there and then represented to the plaintiff that he (said defendant) had the purchase price, namely \$50, and was then ready to pay it and would on that day pay it to the mother of the plaintiff, but that defendant did not have the said \$50 and did not intend to pay the same; that no part of the purchase price named in the said quitclaim deed has been paid to the plaintiff, and plaintiff alleges on information and belief that it has not been paid to his mother; that said deed is of record in the office of the registrar of conveyances at Honolulu in liber 382, page 468. A copy of the said quitclaim deed is attached to the bill as a part thereof and shows that it in terms quitclaims and releases all of plaintiff's right, title and interest in and to all real and personal property in the estate of S. P. Halama inherited by plaintiff

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and his sister Kelupe Sylva. Plaintiff disaffirms the said quitclaim deed and prays that it be decreed to be void and that the same be canceled. To the bill defendant filed his answer admitting the execution of the said quitclaim deed; admitting that he knew the property and its value and that it was at the time of the value of \$500; admitting that the said \$50 had not been paid, but alleging that on the day the deed was executed that he paid to the mother of the plaintiff the sum of \$10 and then promised to pay the balance soon after his return to Maui, and alleging that he did not do so owing to the fact that he was informed on the day following the execution of the quitclaim deed to him that the plaintiff had executed and delivered to another party another deed for the said property, to set aside which deed he was compelled to and did commence a suit in equity in which he succeeded but expended in costs and expenses \$300 or thereabouts. The answer denies the material allegations of the bill, not admitted as herein shown, and denies that the plaintiff had any interest in the property described in said quitclaim deed.

Two witnesses testified positively that plaintiff was born in December, 1893. While one of the witnesses for the plaintiff (his mother) was being cross-examined counsel for defendant showed her a Bible with red covers, in which an entry in pencil to the effect that plaintiff was born December 23, 1892, appears, but the witness denied that the Bible then shown her was the family Bible, and said that she did not know whose Bible it was or who made the entry. She further testified that her husband did enter in a Bible the date of her marriage to him (November 20, 1892) and the date of the birth of plaintiff (December 23, 1893), but said that the Bible then shown her was not the Bible in which said entries were made, and said the Bible in which her husband made the entries had black covers. Counsel for the defendant then stated that he would later identify the

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Bible presented to the witness and offer it in evidence, but did not do so. The defendant introduced only one witness, Hoonani, who testified that plaintiff was born in December, 1892. While this witness was being cross-examined by counsel for the plaintiff, and before the cross-examination was closed, the circuit judge interrupted the hearing and said:

"I am inclined to hold this deed operative. According to my understanding of the matter it makes but little difference to any one whether this child was born in '92 or '93. Plaintiff has failed in proving his allegation of fraud and has failed in his allegation of value and has failed otherwise.

"I am not going to set aside this deed simply because he may not have been of age, if such was the case. If he was not of age his deed would not be void, but voidable. If he was a minor when he made the deed, he might ignore this act under proper conditions; and if he is not estopped by other evidence. I think there is much in this case against him. The next day after making this deed he makes a deed of the same property to another party; how much he obtained for the second deed I do not know. On the witness stand he does not seem to care much one way or the other about what the result may be of this trial. I think when the defendant is required to pay the balance of \$40.00, that is all that ought to be required in this case. I hold that the plaintiff has failed in his proof. Now what kind of an order can the court make so as to say that this \$40.00 shall be absolutely paid to this woman, his mother, and the deed stand.

"I am going to temper these things with equity in this case. I do not find any wrong on the part of the defendant—any misstatements. You fail altogether in that. I do not think that you have made out your case. I think this deed ought to be sustained. Plaintiff does not give evidence by his demeanor that he is in great earnest and does not seem to care much about the matter. I will order the deed to be confirmed, stand confirmed upon defendant paying into court the balance of the purchase money for the use of his mother. If he does not do that, within six months, I will open up the case again."

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Plaintiff moved the circuit judge to set aside the decision on the ground that he erred in deciding in favor of defendant after finding that the plaintiff was born in December, 1893, the plaintiff being a minor at the time the deed was executed. The circuit judge denied this motion, filing a written decision wherein he said:

"The plaintiff files this motion basing it on the proposition that the court found that the plaintiff was born in 1893 instead of 1892. This is not correct. To the contrary the court found generally that the plaintiff had failed to make out his case. And this includes the allegation of his being born in 1893. There is no evidence as to the date of the death of Kaleianuenue's first husband. He may have died in 1892 and may have been the father of this plaintiff. She married again in '92, and how long her prior husband had been dead at that time there is no evidence to show. The plaintiff was born, so says the Bible and so says the woman Hoonani, in December '92. The fact that her second husband made the entry of the plaintiff's birth as December 23, '92, would seem to be strong evidence of the elder son that the plaintiff was born in December '93, and also the confused statements of the mother. Upon the witness stand they hand her the Bible and she was a very long time in examining it. She questioned it being the correct Bible. She seemed to be suffering from the implications that might arise in the Bible against her. I am not satisfied that she fully understood the entries in the Bible. Her elder son, who testifies that the plaintiff was born in '93 has rather a singular story in relation to his being there at the time and the cause of his visit. In short, what the court has held and still holds is that the plaintiff has failed in his case as to showing himself a minor at the time he alleged he made this deed, and also upon every other part of his case. And the court further finds and held and still holds that there is no equity in the plaintiff's claim. Motion for new trial overruled."

Thereafter a decree was filed, which, after entitling, court and cause, is as follows:

"This cause came on duly for trial on the 4th day of March, 1915, the complainant being present in person and

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by Eugene K. Aiu and Noa W. Aluli, his attorneys, and the defendant, in person and by J. Lightfoot, his attorney:

"And the court, after hearing the evidence, having decided that the deed sought to be cancelled be sustained upon the payment, within six months, of the sum of forty dollars (\$40.00) by the defendant to Kaleianuenue, the mother of the complainant.

"It is therefore ordered, adjudged and decreed, That this cause be, and the same is hereby, dismissed, upon the payment by the defendant to Kaleianuenue, the mother of the complainant, of the sum of forty dollars (\$40.00) within six months from the said 4th day of March, 1915."

From said decree the plaintiff has appealed to this court and in his brief assigns the following errors, to wit:

"(1) In not considering the question as to whether or not the plaintiff was under age when he executed the deed;

"(2) In holding that there was a failure of proof on the part of the plaintiff;

"(3) In terminating the trial in such a manner as to deprive the plaintiff of his right to fully cross-examine Hoonani, the witness for the defendant, and of introducing evidence in rebuttal;

"(4) In finding (if he so found) that plaintiff was of age when he executed the deed."

It will not be necessary to discuss the errors specified *seriatim*. In the decision announced orally the circuit judge seems to have taken the position that the age of the plaintiff, and whether he was or was not a minor at the time of executing the deed in question, were immaterial, but in his written decision on the motion to set aside the oral decision he holds that he found that the plaintiff failed to prove that he was a minor at the time of the execution of the deed.

The action of the court in interrupting the cross-examination of defendant's witness and there and then dismissing the plaintiff's bill was prejudicial to substantial rights of the plaintiff. It took from the plaintiff the opportunity of

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further cross-examination of the said witness, prevented the defendant from offering further testimony and deprived the plaintiff of the opportunity of offering rebutting evidence. This action of the circuit judge was error which requires a reversal. In his decision of plaintiff's motion to set the decision aside the circuit judge refers to the entry in the Bible, shown to a witness for plaintiff (in which an entry in pencil shows the plaintiff's birth to have been in December, 1892) as evidence of the date of his birth at that time. This was prejudicial error as the authenticity of such Bible was in dispute, it had not been identified and had not been introduced in evidence, hence was not evidence in the cause.

One of the positions assumed by the defendant is that the plaintiff had no interest whatever in the property conveyed by said quitclaim deed, but the ground upon which such contention is based is not stated in the record nor in the brief of counsel for defendant.

As a reversal on the grounds suggested must be had it is not necessary to discuss the evidence showing the fact as to whether plaintiff was born in December, 1892, as claimed by defendant, or in December, 1893, as claimed on behalf of the plaintiff. If his birth was in December, 1893, he was a minor at the time that he executed the quitclaim deed in controversy and has a legal right to disaffirm the same, while, if born in December, 1892, as claimed by defendant, he was an adult at the time of the execution of said quitclaim deed.

The judgment is reversed and the cause remanded to the circuit judge for further proceedings consistent with the views herein expressed. Costs of appeal awarded to appellant.

E. K. Aiu for plaintiff.

J. Lightfoot for defendant.

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JOSEPH P. MENDONCA v. G. NAKAMURA, AND I. YAMAMOTO, M. KOMEYA, Y. ISHII, E. IWA-SHITA, T. MITAMURA, S. KOBAYASHI, S. KU-SHIMA, M. OYAMA AND S. KOBAYASHI, DOING BUSINESS AS PARTNERS IN HONOLULU UNDER THE FIRM NAME OF THE JAPANESE BANK, AND K. SAMURA.

No. 930.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED APRIL 25, 1916.

DECIDED MAY 4, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LANDLORD AND TENANT—*liability of subtenant to the landlord.*

A subtenant is not liable upon a covenant to pay rent contained in the contract of lease between the landlord and the tenant under whom the subleasing exists; but where the subtenant enters with the assent of the landlord under an agreement, express or implied, to pay rent to the landlord, an action for use and occupation is maintainable by the landlord against the subtenant.

ASSUMPSIT—*pleading—misjoinder of defendants.*

In an action of assumpsit against several defendants a defendant against whom a cause of action is stated cannot demur on the ground that the declaration shows no cause of action against another defendant.

OPINION OF THE COURT BY WATSON, J.

This was an action of assumpsit to recover from the defendants the sum of \$375, the balance alleged to be due to plaintiff for the rent of certain premises situate on Hotel street in Honolulu for the months of July, August, September and October, 1915, the defendant Nakamura being plaintiff's lessee, and the remaining defendants subtenants

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of said Nakamura. The declaration is in three counts as follows:

"First Count. That said defendants heretofore to-wit on October 11, 1915, at Honolulu, City and County of Honolulu, Territory of Hawaii, became indebted to said plaintiff in the sum of six hundred and twenty-five dollars (\$625) for rent for the use and occupation of that certain premises situate on the mauka Ewa corner of Hotel and Smith streets in said Honolulu, being the two stores numbered 52 and 54 North Hotel street, for the months of June, July, August, September to and including October 31, 1915, at \$125 per month, the said premises being the property of said plaintiff, and demised by plaintiff to the defendant G. Nakamura, by indenture of lease dated September 25, 1911, for a term of 5 years from October 1, 1911, at a monthly rental of \$125 payable in advance on the first day of each and every month during said term, without notice or demand, and upon the condition, among others, that said lessee, G. Nakamura, would not without the consent of said lessor, plaintiff herein, assign said lease, nor underlet nor part with the possession of the whole or any part of said premises, a copy of said lease being hereto attached and hereby made part hereof, marked Exhibit A; that said premises were thereafter orally and with the consent of plaintiff let to all of the remaining defendants above named by the said G. Nakamura, upon a month to month tenancy, upon the promise of said defendants to pay to the plaintiff herein, the said rental of \$125 per month in advance upon the first of each and every month without notice or demand, during their occupancy of said premises; that said defendants have been in possession and have had the use and enjoyment of said premises for said months of June, July, August, September, and October, 1915, and promised plaintiff to pay to him said rental of \$125 per month upon the first day of each and every month, in advance, without notice or demand; that said plaintiff has demanded payment of said rental from said defendants but the defendants, though promising to pay the same, have failed and neglected to pay the same or any part thereof save and except the sum of \$250, paid on

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October 12, 1915; to the damage of said plaintiff in said sum of three hundred seventy-five dollars (\$375.00).

"Second Count. That said defendants heretofore to-wit on October 11, 1915, at Honolulu aforesaid, became indebted to said plaintiff in the sum of \$625 for rent for use and occupation of that certain premises situate on the mauka Ewa corner of Hotel and Smith streets, in said Honolulu, being the two stores numbered 52 and 54, North Hotel street, for the months of June, July, August, September to and including October 31, 1915, at \$125 per month, the said premises being the property of said plaintiff; that said defendants have been in possession and have had the use and enjoyment of said premises for said months of June, July, August, September and October, 1915, and promised plaintiff to pay to him when thereunto afterwards requested for the use and occupation of said premises such sum as the same were reasonably worth; that the use and enjoyment of said premises were and are reasonably worth the sum of \$125 per month and were and are worth the sum of \$625 for said months of June, July, August, September and October, 1915; that said plaintiff has demanded payment of said rental of \$125.00 per month, amounting in all to \$625 for said months of June, July, August, September and October, 1915, but the defendants, though promising to pay the same, have failed and neglected to pay the same or any part thereof save and except the said sum of \$250 paid on October 12, 1915; to the damage of said plaintiff in the said sum of \$375.00."

The third count is upon an account stated for the balance of \$375. The prayer was for the sum of \$375 together with interest, attorney's commissions and costs of court.

The lease from plaintiff to the defendant G. Nakamura was attached to and made a part of the declaration as exhibit A, the material terms of the lease being set forth in the first count hereinabove. The lease contains, among others, a covenant on the part of the lessee that he will not without the consent of the lessor assign said lease nor underlet nor part with the possession of the whole or any part of the premises. The lease also contains the usual cov-

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enant to pay rent with a provision for forfeiture and re-entry by the lessor for failure by the lessee to perform any of the covenants of said lease.

Upon the filing of the declaration four of the defendants (other than Nakamura) appeared and interposed the following demurrer thereto:

"(1) That the first count in said declaration is inconsistent with the other counts therein;

"(2) That it appears by the said declaration that these defendants are not liable for the said rent, but that only one of said defendants is liable therefor, namely, G. Nakamura;

"(3) That there is no privity of contract between these defendants and plaintiff shown in said declaration."

After argument the demurrer was sustained (upon what ground or grounds does not appear), and, the plaintiff refusing to amend, the court thereafter made and entered its order and judgment sustaining the said demurrer and dismissing the complaint, with costs against the plaintiff. Plaintiff thereupon duly excepted, the single exception before this court going to the action of the trial court in sustaining the demurrer and dismissing the complaint.

It is contended by counsel for appellees under the first ground of the demurrer that plaintiff's declaration is fatally defective for inconsistency and repugnancy in that the first and second counts are predicated upon the lease, and the last count (account stated) upon the absence of a lease. We think the basic error of this contention is shown by an examination of the declaration itself, from which it appears that plaintiff is not attempting to hold the defendants other than Nakamura (that is, the subtenants) under the covenant to pay rent contained in the lease but under their oral promise to pay rent to the plaintiff during their occupancy of the premises upon a month to month tenancy. The first count alleges the lease to Nakamura for a period of five years, the subletting by him of the premises to the other

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defendants upon a month to month tenancy, with the consent of the lessor (plaintiff herein), and the express promise of the defendants to pay to plaintiff the rental of \$125 per month during their occupancy of said premises. The second count alleges the lease, the subletting, and the promise of the defendants to pay plaintiff for the use of said premises what the same were reasonably worth. The third count is upon an account stated. None of the counts of the declaration are predicated upon the lessee's covenant to pay rent but upon the express undertaking and agreement of the undertenants to pay rent to the lessor, during their occupation, upon a month to month tenancy. It is well settled that the lessor cannot sue the undertenant upon the lessee's covenant to pay rent, but it is equally well settled that where the undertenant enters with the assent of the lessor under an agreement, express or implied, to pay rent to the lessor, an action is maintainable by the lessor against the undertenant, not under the lessor's covenant to pay rent, but for use and occupation under the agreement of the undertenant to attorn to the lessor. 2 Taylor's L. & T. (8th ed.) §448, n. 5 and cases cited. In *Jennings v. Alexander*, 1 Hilton (N. Y.) 154, which was an action by the lessor against an undertenant for rent, the court on page 155 said: "The defendant entered under O. R. Burnham (the lessee), and not under the plaintiff, and it was necessary to show some promise, express or implied, to pay the rent to the plaintiff by the defendant, with the assent of the lessor. In that case the action could be maintained. *McFarlan v. Watson*, 3 Comstock (N. Y.) 286." "According to the findings Felker is subtenant and not liable to appellants (lessors) for rents unless by virtue of his undertaking with Hardin. Wood, Landl. & Ten. 545, 547; *Harvey v. McGrew*, 44 Tex. 412. But if Hardin had assigned his term Felker then would have been liable upon all the covenants of the lease." *Giddings et al v. Felker et al.* (Tex.) 7 S. W. 694, 695.

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We think the counts in plaintiff's declaration are neither repugnant nor objectionably inconsistent (*Harrison v. Magoon*, 13 Haw. 339, 359) and that the same were properly joined in his action of assumpsit. The rule as to when assumpsit lies and what counts may be joined in such an action is stated in 1 Ency. Pl. & Prac. 169, as follows: "The action of assumpsit is one brought to recover damages for the breach of a contract not under seal. All causes of action enforceable in assumpsit may be joined."

The second and third counts of the demurrer are equally untenable. The demurring defendants are all subtenants of the original lessee, and from what has been said above it is obvious that a cause of action has been stated against them and that privity of contract has been shown to exist between them and the plaintiff. The subletting being for a period less than one year, that is, upon a month to month tenancy, the contract was not within the statute of frauds and was not required to be in writing. There is but one cause of action stated in the declaration and that is against the undertenants (the defendants other than Nakamura), and the fact that Nakamura (the lessee) has been joined as a party defendant does not render it bad as misjoining causes of action (23 Cyc. 434). Nor can the remaining defendants, the cotenants against whom a cause of action is stated, demur on the ground that the declaration shows no cause of action against another defendant (31 Cyc. 274). For an application of this rule in an equity case see *Pond v. Montgomery*, 22 Haw. 241.

Exception sustained.

C. F. Peterson for plaintiff.

J. A. Magoon for defendants.

Syllabus.

HIDETARO SAKAN AND K. HIRATA *v.* HON. C. W. ASHFORD, FIRST JUDGE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII, KISHICHI NODA, SENSUKE OKAMOTO, TOYOKICHI SHINDO, YASABURA HASEGAWA, SADAJIRO TONOMURA, SIESHIRO TERADA AND JINGORO NISHIKAWA.

No. 945.

PETITION FOR WRIT OF PROHIBITION.

ARGUED APRIL 24, 1916.

DECIDED MAY 5, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PROHIBITION—*equity—jurisdiction.*

Where a bill in equity shows that the controversy between the parties is such as a court of equity may properly take cognizance of, prohibition does not lie to restrain the proceeding because the bill shows that the complainants have an adequate remedy at law, or is demurrable on some other ground which does not go to the jurisdiction of equity over the subject matter.

CONTEMPT—*order to show cause—sufficiency of form.*

In a case of constructive contempt of court, where a proper showing has been made for the issuance of an order to show cause why the alleged contemnor should not be punished, the order is sufficient in form if it states in a general way the nature of the charge made against the party.

OPINION OF THE COURT BY ROBERTSON, C.J.

On March 21, 1916, the respondents herein, other than the circuit judge, filed a bill in equity against the petitioners herein averring a conspiracy, fraud, insolvency, and admission of indebtedness, and praying for discovery, an injunction, and that the respondents therein be decreed to be trustees for the complainants with respect to certain goods, wares and merchandise alleged to have been ob-

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tained from the complainants by the respondent Sakan and by him transferred to the respondent Hirata, and the proceeds of certain thereof alleged to have been sold by the latter, and for other relief. The bill seems to have been intended to state grounds for relief both as an ordinary creditors' bill and as one to establish and enforce a constructive trust. Upon the filing of the bill the circuit judge made an order temporarily restraining the respondents from selling, assigning or otherwise disposing of the property in question; and directing them to appear before him and show cause, on the 24th day of March, why the injunction prayed for in the bill should not issue forthwith, and why they should not answer the interrogatories propounded in the bill, and why the other relief prayed for should not be granted. The object of the court in making this strange order seems to have been to force the respondents to a hearing upon the merits of the controversy upon three days notice, although process in the usual form had issued upon the filing of the bill summoning the respondents to appear and answer ten days after service. On March 24 the respondents appeared and filed a document designated "Return to Order to Show Cause." It was therein set forth that the court was without jurisdiction to consider the matters averred in the bill of complaint because they do not state a case for equitable relief; that it was not made to appear that the complainants' claims had been reduced to judgment or determined by a court of law; that the United States District Court in and for the District and Territory of Hawaii has exclusive jurisdiction of all the matters and things averred in the bill; and that the bill is indefinite, uncertain and unintelligible. It prayed that the order to show cause be discharged. The document was regarded by the circuit judge as a demurrer to the bill and, as such, was overruled on April 13. An interlocutory appeal to this court was allowed but was not perfected. On April 18 the circuit judge entered

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an order purporting to have been based "on motion of George S. Curry, counsel for the plaintiffs herein, and on the showing made," and directing the said Hirata to appear in court on the 20th day of April and show cause why he should not be adjudged guilty of contempt of court "for violating the temporary injunction and restraining order issued, made and entered herein on the 21st day of March." On April 19 the respondents Sakan and Hirata applied for and obtained this writ of prohibition with the view of having the circuit judge restrained from proceeding further with the suit in equity. On behalf of these petitioners it is here contended that the court of equity is without jurisdiction in the premises because the complainants have a plain, adequate and complete remedy at law with reference to the matters averred in the bill; that they are entitled to a trial by jury upon the claims; that it does not appear that the creditors have exhausted their remedy at law by reducing their claims to judgment followed by return of execution *nulla bona*; and that the federal court in bankruptcy has jurisdiction. It is unnecessary to recapitulate the averments contained in the lengthy bill. It is enough to say that the bill contains at least enough to indicate that the complainants have claims of equitable cognizance against the respondents. The nature of the subject matter disclosed by it is such as equity may take jurisdiction of. If it does appear from the bill that the complainants have an adequate and efficacious remedy at law and it is not a case where the jurisdiction at law and in equity is concurrent, or if the bill is deficient of allegation in some respect, the demurrer, so called, presumably was improperly overruled, but with reference to that ruling—at most a mere error—the respondents will have a sufficient remedy by way of appeal or writ of error from an adverse final decree if one be entered. If the bill is defective in form the complain-

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ants may, in the meantime, obtain permission to amend it. To be entitled to a perpetual writ of prohibition the petitioner therefor must show not only that the lower court is proceeding without jurisdiction, or in excess of its jurisdiction, but also that no other adequate means of relief is available to him. *Union Feed Co. v. Kaaihue*, 21 Haw. 345; *Oyama v. Stuart*, 22 Haw. 693. However, the contention that the circuit judge, sitting in equity, has no jurisdiction of the subject matter of the suit in question is not sustained. When a court of equity has jurisdiction of the subject matter of a suit and is competent to grant the relief sought its power to determine the controversy and enter a valid decree is not defeated by the fact that the complainant has a plain, adequate and complete remedy at law. See 16 Cyc. 128; *Kuala v. Kuapahi*, 15 Haw. 300, and cases there cited. A bill in equity may be demurrable because of the existence of a complete and adequate remedy at law and yet the suit be not without the jurisdiction of a court of equity. This is shown in *Kuala v. Kuapahi*, and similar cases, for if the existence of the legal remedy goes to the jurisdiction of equity under any and all circumstances no waiver of the defense could confer jurisdiction. The line of cases referred to shows that that is not so. And so, again, with reference to the contention that the bill cannot be maintained as a creditors' bill in the absence of an averment that the complainants have obtained judgment at law and that execution has been returned thereon *nulla bona*, if, under the circumstances averred, the general rule which is invoked applies (a point we do not decide), and the bill cannot otherwise be maintained against a demurrer, still the jurisdiction of the equity court over the subject matter would not be affected. And so, also, with reference to the contention that there is exclusive jurisdiction in the federal court because the bill avers that on

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March 17, 1916, certain of the complainants filed a petition in that court to have the respondent Sakan adjudged an involuntary bankrupt. It is not averred that an adjudication of bankruptcy has been made. If such an adjudication shall be made, and a trustee be appointed in due course, and it is found that the prosecution of the suit in equity will interfere with the proper administration of the bankrupt's estate, the suit, presumably, may be stayed, at least as to the respondent Sakan, by the bankruptcy court. (See Collier on Bankruptcy (10th ed.) p. 266.) But it does not appear from the record before us that there is a lack of jurisdiction in the premises in the equity court by reason of the filing of the petition in bankruptcy.

Was the order of April 18, directing the respondent Hirata to appear and show cause why he should not be adjudged guilty of contempt of court, made without jurisdiction, and should proceedings upon it be prohibited? It is settled law in this Territory that a proceeding for contempt of court for violating a void order will be restrained even though the question of jurisdiction was not first raised in the lower court. *Dole v. Gear*, 14 Haw. 554, 568; *Rose v. Ashford*, 22 Haw. 469. In *Rose v. Ashford* it was also held that in cases of constructive contempt where the facts constituting the alleged offense do not appear of record and are not evident to the court it is necessary, to give the court jurisdiction to proceed against the contemnor, that a complaint in some form setting forth the facts which it is claimed constitute the contempt be filed as a basis for the citation. This is for the information of the court and to apprise the party proceeded against of what he is accused. In the case at bar no such complaint appears in the record, but the order itself recites that a showing was made, and the petition for the writ does not aver that it was not made. Under these circumstances we must assume that

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the recital was true and that a proper foundation for the order was presented to the circuit judge. It was not necessary that the citation to appear should have set forth what the showing was. It would be a case of civil constructive contempt, and Hirata was already in court as a party to the equity suit. It was enough that the order should state generally, as it did, that the party was charged upon a certain showing made to the court with having violated the restraining order mentioned. "No great strictness is required in the construction or form of a rule requiring a defendant to show cause why he should not be punished for contempt. In cases where an information is filed it is sufficient if the rule informs him, in a general way, of the nature of the charge preferred against him; for it is enough that the rule conveys such notice as will apprise him of the fact that a charge is pending against him, and put him upon inquiry." *Hawkins v. State*, 125 Ind. 570, 574.

Our conclusion is that it has not been shown that the circuit judge has proceeded without jurisdiction, and that the temporary writ heretofore issued herein should be dissolved. It is so ordered.

J. Lightfoot for petitioners.

G. S. Curry for respondents.

Syllabus.

RINSABURA KUWAHARA v. SADA KUWAHARA.

NO. 922.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED APRIL 3, 1916.

DECIDED MAY 12, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—application of maxims—“he who comes into equity must come with clean hands.”

The equitable maxim that “he who comes into equity must come with clean hands” has no application in a case where the relief sought is entirely proper and legal and in no way dependent upon the complainant’s previous wrongful (criminal) act.

TRUSTS—evidence—weight and sufficiency.

A constructive trust must be established by evidence which is clear, definite, unequivocal and satisfactory. Decree herein reversed on the evidence.

OPINION OF THE COURT BY WATSON, J.

This is an appeal by respondent from a decree in complainant’s favor in a suit for accounting and other relief, wherein it was sought to hold the respondent liable as trustee under a constructive trust for one-half of the proceeds of the sale of a certain leasehold and the improvements thereon and for one-half of the rentals received by her from said property. The following facts were averred in the complaint: That in February, 1906, Torakichi Kuwahara, a brother of complainant, since deceased, informed complainant that one Matsushima was the lessee of a certain lot in Wailuku and that he was willing to transfer said lot to the complainant; that complainant, relying on the statement and good faith of said Torakichi Kuwahara, accepted from him what purported to be, and what the

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said Torakichi Kuwahara assured complainant was, a transfer to complainant of said leasehold interest for the unexpired term; that thereupon complainant erected a building upon said lot at his sole expense, which building was completed in June, 1906; that complainant, in consideration of the payment to him by said Torakichi Kuwahara of one-half of the cost of said building, sold and transferred by oral agreement to said Torakichi Kuwahara a one-half interest in said building and placed said Torakichi Kuwahara in charge of said building as the agent and manager of complainant; that thereafter and until March, 1909, the said Torakichi Kuwahara remained in charge of said building and turned over to complainant one-half of the rents accruing therefrom; that in March, 1909, said Torakichi Kuwahara, while still agent for complainant, and knowing that the beforementioned purported transfer by Matsushima to complainant was, in fact, never signed or authorized by said Matsushima, and knowing that the said land and premises were owned by the Wailuku Sugar Company, Limited, and leased to one Masakichi Kido, for the purpose and with a design of defrauding complainant, with the consent of said Wailuku Sugar Company, and without the knowledge of complainant, procured from the said Masakichi Kido to himself, the said Torakichi Kuwahara, an assignment of the said lease covering the said premises on which complainant had erected the building aforesaid; that in November, 1909, complainant and said Torakichi Kuwahara had a quarrel over the rentals from said building which resulted in the death of said Torakichi Kuwahara; that after the death of said Torakichi Kuwahara, the respondent herein, the widow of said Torakichi Kuwahara, held and enjoyed the said building and the rents thereof as her own property until the month of May, 1915, when she sold said building for \$500; that complainant has demanded of said respondent \$250, the price of his half inter-

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est in said building, together with one-half of the rents which the said respondent has collected since the death of her husband (November, 1909). The decree of the court (no written decision having been filed) was that the complainant have and recover from the respondent, Sada Kuwahara, the sum of \$250, and that the said Sada Kuwahara pay unto the said Rinsabura Kuwahara the said sum of \$250, and that she, the said Sada Kuwahara, account to and with the said Rinsabura Kuwahara of and concerning one-half of the rental and income of and from the said building collected and received by her, and upon such accounting pay over to the said Rinsabura Kuwahara all such amounts of money as may be found due him, and that the said respondent pay the costs.

The appeal herein is predicated upon two grounds: (1) that appellee failed to prove by evidence other than his own, which could only be met by the murdered man, the material allegations of his bill, and (2) that appellee, having murdered respondent's husband and predecessor in title, Torakichi Kuwahara, through whom she claims as an heir at law, has not come into court with clean hands, and therefore is not entitled to relief in a court of equity.

Considering these grounds of appeal in their inverse order we cannot sustain the contention of appellant that appellee (complainant below), by reason of having murdered respondent's husband and predecessor in title, is barred from relief in a court of equity. It appears from the undisputed evidence that complainant and Torakichi Kuwahara, in November 1909, quarreled over the rentals of the property in question during which quarrel the complainant killed said Torakichi; that complainant was tried for said killing, found guilty of the offense of murder in the second degree, and was sentenced to, and is now serving, a term of thirty-five years in Oahu prison. What the facts were leading up to the killing does not appear. We

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are of the opinion that the maxim that "he who comes into equity must come with clean hands" has no such application as the respondent seeks to give it. In the case at bar the relief sought is entirely proper and legal, and, as we view it, in no wise dependent upon the complainant's previous wrongful act. Public policy does not require that the complainant be deprived of his property rights because of his criminal act, for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime.

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong v. Toler*, 11 Wheat. 258; *Faikney v. Reynolds*, 4 Burrow, 2069; *Petrie v. Hannay*, 3 T. R. 418; *Farmer v. Russell*, 1 B. & P. 296; *Planters' Bank v. Union Bank*, 16 Wall. 483; *McBlair v. Gibbes*, 17 How. 232, 236; *Brooks v. Martin*, 2 Wall. 70; *Bly v. Second Nat. Bank*, 77 Penn. St. 453." *Armstrong v. American Exch. Bank*, 133 U. S. 433, 469. See also *Shaver v. Heller & Merz Co.* 108 Fed. 821, 834, 65 L. R. A. 878, 887; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 128; *Upchurch v. Anderson* (Tenn.), 52 S. W. 917, 922; 1 Pom. Eq. Jur. §399.

"The maxim that he who comes into equity must do equity cannot deprive the complainants of their right to an accounting which is not founded in any way upon their wrongful conduct." *Ely v. King-Richardson Co.*, L. R. A. 1915B 1052, 1056, 265 Ill. 148, 106 N. E. 619.

The second ground of appeal (numbered (1) hereinabove), under which it is argued by counsel for appellant that the decree of the lower court is not sustained by the evidence, presents a question of more difficulty. The rule is well established that a constructive trust cannot be established by a mere preponderance of the evidence, but must be established by evidence which is clear, definite, unequivocal and satisfactory. 39 Cyc. 192, 193. A demurrer to the

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bill of complaint having been overruled respondent filed an answer in which it was admitted by her that, claiming through her deceased husband, she had since his death (November, 1909) held and enjoyed said building and the rents therefrom as her own property until the month of May, 1915, when she sold said building for \$500. Thus the only material fact at issue was whether a copartnership (or tenancy in common) existed between respondent's said husband and complainant as to said building at the time of the death of the said Torakichi. This was denied by the respondent. A careful reading of the testimony fails to convince us that the existence of a trust was established by clear and satisfactory evidence or that complainant is entitled to the relief awarded him. It appears without dispute that the building was started in February, 1906, and completed in June, 1906; that it cost about \$600 or \$650, and that the labor and material were wholly paid for by complainant. It is further undisputed that the original agreement between complainant and Torakichi was that the building should be erected by them as copartners. This was testified to not only by the complainant and other witnesses called by him, but was admitted by the respondent in testifying as a witness in her own behalf. She further testified, however, that there was a subsequent agreement between her husband and complainant by which Torakichi was to pay to complainant the entire cost of the building and take the same over as his own property. It was of course vital to complainant's case to show in this suit against Torakichi's widow and heir at law that the copartnership relation existed at the time of Torakichi's death. This appears only inferentially from the testimony of the complainant himself, and none of the witnesses called by him pretended to have any knowledge of the relation that existed between complainant and Torakichi with respect to the ownership of the building after the time when the

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erection of the building was started (more than three years prior to Torakichi's death). Honda, the contractor who built the house, testified that he built the building for the two Kuwaharas in (as) copartners, "both of them told me it was a company;" that Rinsabura Kuwahara, the complainant, bought and paid for the lumber and paid him for building the house. The witness Koda testified that the building was put up in copartnership between Rinsabura Kuwahara and Torakichi Kuwahara; that he heard the matter talked over in a conversation at complainant's house, when, besides himself, Torakichi and another younger brother were present. When this conversation took place or that complainant was present on that occasion does not appear. The complainant did not rebut the evidence of the respondent as to the subsequent arrangement with Torakichi, and as the record stands the testimony of the respondent as to such subsequent arrangement, under which Torakichi was to pay to complainant the entire cost of the building and take the same over as his own property, is uncontradicted by the positive testimony of any witness. The testimony of the complainant is that Torakichi paid him for his (Torakichi's) share of the building \$150 in June, 1906, and about a year later \$170, and that from June, 1906, when the building was completed (for a period of thirty-three months), until March or April, 1909, Torakichi paid him one-half of the rentals of the building (\$11.50 a month). On the other hand, the respondent identified and introduced in evidence a memorandum book which she testified was her husband's and kept by him, showing entries of payments to complainant in the handwriting of her husband as follows: March 21, 1906, \$230; June 9, \$175. She testified that when the \$175 was paid the complainant (Rinsabura) told her husband in her presence, "Now you pay this hundred and seventy-five dollars and for the balance you can

Quarles, J., concurring.

pay by instalments eleven and a half, then you will pay us up within 22 months." She testified that those payments were for all of the interest which the complainant (Rinsabura) had in the place. She also testified that the house was not completed when the \$230 was paid and that it was completed in June; that the house cost about \$600, but she did not know exactly how much. Respondent also testified that she had with her, when testifying as a witness, another book of account kept by her husband for the instalments of \$11.50 monthly. It occurs to us that this second book might have shed some light on the question as to whether these monthly instalments paid by Torakichi to the complainant were paid by way of rental due to the complainant as a copartner or on account of balance of purchase price under the theory testified to by respondent. But the book, so far as the record shows, was not offered in evidence, nor was any witness examined as to its contents. If the payment of these monthly instalments, which admittedly were made by Torakichi to complainant after the month of June, 1906, can be reasonably accounted for on a theory that they were for the balance of the purchase price, it seems clear that no trust can be held to be established.

We hold that the evidence as to the existence of the alleged trust is not sufficiently clear and satisfactory to justify the decree. The same is therefore reversed with costs to the appellant, and the cause is remanded.

E. R. Bevins for complainant.

E. Murphy for respondent.

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion reached that the evidence in this case is too uncertain and doubtful to authorize the court to declare a trust in favor of the plaintiff (*Jarrett v. Manini*, 2 Haw. 667, 673; *Kamihana v. Glade*, 5 Haw. 497; 1 Perry on Trusts, 6th ed., Secs. 137, 139, 141; 39 Cyc. 166,

Quarles, J., concurring.

167). I am of the opinion that under the allegations of the bill and of the answer of respondent and the evidence the plaintiff, by killing his brother, his opponent in the matter of the controversy before the court, is in the position of one who destroys evidence, and that his evidence should be considered as opposed or rebutted by that of his brother whom he killed. "Concealing or destroying evidential material is admissible; in particular, the destruction (spoliation) of documents as evidence of an admission that their contents are as alleged by the opponent. That the fraudulent conduct was in connection with other litigation does not necessarily exclude it" (1 Gr. Ev., 16th ed., Sec. 195a, citing *Georgia R. & B. Co. v. Lybrend*, 99 Ga. 421; *Com. v. Sacket*, 22 Pick. 394; *State v. Staples*, 47 N. H. 113).

The more plausible theory from the evidence in the record before us is that the two Kuwaharas started in to put up the building in joint ownership; that before the building was completed the plaintiff sold his interest therein to his brother, now dead, this transaction occurring in June, 1906, after which time the plaintiff had no interest whatsoever in the property out of which the present controversy grew. Under the evidence, as well as the allegations of plaintiff's bill of complaint, his brother refused to pay him anything whatever on account of this property after March, 1909, and as this suit was commenced October 14, 1915, his claim to have a trust declared is stale. The respondent demurred to the bill of complaint on the ground that it was stale, and in my opinion the demurrer should have been sustained. "Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que trust*, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate" (1 Perry on Trusts, 6th ed., Sec. 141).

Syllabus.

TERRITORY v. JOSEPH QUINI.

No. 932.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED APRIL 25, 1916.

DECIDED MAY 13, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PARENT AND CHILD—*divorce—criminal law—jurisdiction.*

In a prosecution under section 2970, R. L., for refusing to provide support and maintenance for his minor children, it is no defense on the part of the accused that his wife has been decreed a divorce, alimony, and the custody of their minor children (the decree being silent as to their support). In such case the district court has jurisdiction to convict the defendant, to suspend sentence for one year, and to require him to pay \$2.50 weekly for support of his two minor children and to require him to give bond to secure such weekly payments.

OPINION OF THE COURT BY QUARLES, J.

The defendant was arrested about 4:30 P. M., February 11, 1916, when about to leave for Japan on a steamer that was to sail at 5 P. M. on that day. The following morning he was arraigned in the district court of Honolulu and pleaded not guilty to the following charge:

"That Joseph Quni, at Honolulu, City and County of Honolulu, Territory of Hawaii, during one week last past prior to and including the 11th day of February, A. D. 1916, being then and there the father of certain children to wit: Walter Quni and George Quni, of the age of two years and five years, respectively, did wilfully neglect and refuse to provide for the support and maintenance of the said children, thereby reducing the said children, to destitute and necessitous circumstances, and did then and there and thereby violate the provisions of section 2970 of the Revised Laws of Hawaii, 1915."

At the hearing the venue was admitted by the defend-

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ant and Emma Quini, the divorced wife of the defendant, testified as follows:

"I reside here in Honolulu. I was the wife of the defendant, Joseph Quni. We have 2 children, George, 4 years and 4 months; and Walter 1 year and 8 months. They are in my custody now. I am divorced from my ex-husband, on May 1, 1915. He had not paid anything for their support and maintenance since that divorce was granted. I am not able to support and maintain these children. I had been sick for about 10 months. I have been in the hospital for sometimes. Yes, sir, the children were in need of support. They had no property of any kind, and no money for their support. They are absolutely without any. My ex-husband was trying to go away on the steamer Shinyo Maru. He was arrested about half past 4, in the afternoon of Febr. 11th, the same day I swore out the warrant for his arrest. The steamer was to leave at 5 o'clock. He did not inform me that he was going away. I learn it by accident. A week ago Monday my husband paid me the last payment for the alimony, as he was required under the decree of divorce.

"I did not say that the defendant did not pay anything for 2 weeks for the 2 children. On Febr. 7, he paid me \$15.00 and on Febr. 12th, he paid \$7.50. I was not paid in advance. (Two receipts were offered and received in evidence as 'Defendant's Exhibits 2 and 3') That's all he had been paying \$7.50 since the divorce, and out of that, I had been supporting the children. I never claimed anything else for the support of the children since the divorce on May 1, 1915.

"My ex-husband is a strong and able bodied man. Was working at M. Levy & Co. at \$85.00. It will require \$10.00 a week for the support of the children. I don't pay rent. Am living with my mother. I presume he has money enough to leave the Territory. I don't know if he had money to pay for his attorney."

A copy of the decree of divorce was admitted in evidence. C. F. Peterson testified that when defendant was brought into the police station on the 11th of February he asked the defendant how long he (defendant) expected to be absent, to which defendant replied that he (defendant)

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was going away for an indefinite period, probably five or six months. The witness then asked the defendant if he (defendant) had made any provision for the support of his wife and children and that the defendant said he had not, but intended after he arrived in Japan to make an arrangement for them whereby they would be paid money until his return.

At the close of the evidence the defendant moved that he be discharged upon grounds that are embraced in the notice and certificate of appeal, but the motion was denied and the district magistrate found the defendant guilty, suspended sentence for one year, and made an order that the defendant pay to Emma Quini for the support of his two infant children, Walter and George, \$2.50 per week, payable weekly, for the period of one year from the date of conviction, and further ordered that he give bond for securing such payments in the sum of \$150, the bond to run to Emma Quini for said children, conditioned that upon failure to make such weekly payments the bond be enforced for the penalty thereof.

The points of law stated in the certificate of appeal are as follows.

"1. That the court is without jurisdiction to try said defendant on said charge;

"2. That it affirmatively appears that the defendant could not be guilty of said charge and has not deserted his children or refused or failed to support them, in that it appears from the evidence that the only children defendant has are those born of his marriage with Emma Quini, the complaining witness herein, and that the said defendant and said Emma Quini were absolutely divorced on the first day of May, 1915, by the circuit court of the first judicial circuit, Territory of Hawaii, and that in the decree of said cause, the custody and control of the children of said marriage, being the same children mentioned in this complaint, was taken from the defendant and given to the complaining witness, Emma Quini;

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"3. That it affirmatively appears from the evidence and records in the case that Joseph Quini, the defendant, could not be charged with the support of said children, as the same had been taken from him and given to Emma Quini by decree of the circuit court of the first judicial circuit in the divorce proceedings aforesaid;

"4. That this complaint is an attempt to have the district court of Honolulu modify, amend and nullify a decree of the circuit court of the first judicial circuit, to wit, the decree of divorce in the case of Emma Quini vs. Joseph Quini, D. no. 5359, Reg. 5, page 329, and that the facts alleged in said complaint are *res adjudicata* by reason of said cause, and that this court is without jurisdiction, by reason of said decree, to try the defendant upon the complaint now made against him; which motion was denied by the court from which decision defendant appeals to the supreme court."

The decree of divorce is in the usual form, provides for permanent alimony to the wife in the sum of \$7.50 per week, out of which she should pay the cost of the proceeding and \$25 to her attorney. The only reference to the children in the decree is in the following words: "The custody and keeping of the two (2) minor children of libellant and libellee is hereby awarded to libellant." The vital, if not the only, question to be decided is whether or not the decree of divorce awarding the custody of the children to the divorced wife and awarding her permanent alimony exempted the husband and father of the children from the duty of supporting them. This requires a construction of the decree for the purpose of ascertaining from the language used whether it was intended to provide for the maintenance and support of the minor children or leave that matter to be determined according to rules of law. The evidence of Mrs. Quini that the defendant had during no part of the time since the decree of divorce furnished any support for the children and that their necessities required such support is evidently based upon the assumption that the ali-

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mony allowed was intended for the wife alone and no part thereof was intended for the children. If this assumption is correct, as we hold it to be, the charge against defendant was proven, he was rightly convicted, and the district magistrate was authorized under the provisions of Sec. 2970, R. L., supplemented by Act 100, S. L. 1915, to suspend sentence and require the bond, which he did require.

Both at common law and by statute (R. L. Sec. 2993) the father is charged with the support and maintenance of the children of the marriage during their infancy. It is manifest that children of the ages of two and five years are incapable of supporting themselves and that it is necessary that they be supported and maintained. The evidence established that the defendant is an able-bodied man and capable of earning, and has earned for some time, \$85 per month. There is nothing in the language of the decree which shows that any part of the alimony awarded the wife was intended for the support of the infant children, or that it intended to shift the duty of providing for their support from the husband to the wife. The fact that the law imposes this duty upon the father, and he has ability to discharge this duty, in the absence of language to the contrary, tend to show that the decree was not intended to exempt the father from the duty of providing the means for maintaining and supporting the infant children. We must look, however, for further light by examining cases where the effect of similar decrees has been determined. But first we will examine the principal cases relied on by the defendant:

Brow v. Brightman, 136 Mass. 187, was an action of assumpsit by a third person who had furnished necessities to an infant at the request of the mother who had been divorced and granted the custody of the infant; *Brown v. Smith*, 30 L. R. A. 680, was a suit by the divorced wife, to whom had been awarded the custody of minor children, to

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recover for their maintenance against the estate of the divorced husband; and *Rich v. Rich*, 34 N. Y. S. 854, was a suit by the wife to recover for past services furnished an infant child awarded to her in a divorce decree. It was held in each of these cases that the wife could not recover. In *Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107, the divorced wife to whom had been awarded the custody of the minor children sued for a large sum for their support. The divorce decree allowed her as alimony the sum of \$1500. A statute was then in force in Indiana in which it was provided that "the court in decreeing a divorce shall make provision for the guardianship, custody and support and education of the minor children of such marriage." The court properly held under that statute that the \$1500 allowed the wife was intended for the support of the minor children and that she could not recover in that suit. We have no such statute in this jurisdiction, our statute saying "may" instead of "shall," so that we think that this and other Indiana cases do not apply. The decisions in *Dawson v. Dawson*, 110 Ill. 279 and *Johnson v. Johnson*, 36 Ill. App. 152, support the contention of the defendant that the custody of the minor children being awarded to the mother the father is exonerated from the obligation of caring for them, but by statute and judicial decision another rule now prevails in Illinois, as we will later show.

If this were a civil action brought by the mother to recover compensation for supporting and maintaining the minor children the authorities relied on by the defendant would apply. But they are in the minority, the majority holding that the award of the custody of minor children to the mother in a divorce decree which allows her alimony but is silent as to the support of the children does not release the father from the legal duty of furnishing the means reasonable and necessary for their support. The minority decisions hold that the duty of supporting a

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minor child and the right of his society and earnings are reciprocal and that depriving the father of these rights exempts him from the duty of supporting the minor child. The large majority of the decisions, especially the later ones, that are in point, hold that the husband is legally bound to support his wife; that he is also bound to support his minor children; that the duties are separate and distinct; that the children are not parties to a divorce suit, and although the decree of divorce may award their custody to the mother and allow her alimony, yet if such decree is silent as to the support of the children the husband and father remains liable for their support and is not exempt from such liability by reason of the divorce decree. To this point see the following authorities:

14 Cyc. 811 et seq.; 9 R. C. L., subject "Divorce," paragraphs 295, 296, 297; *Evans v. Evans*, 125 Tenn. 112, 140 S. W. 745; *Spencer v. Spencer*, 97 Minn. 56; *Brown v. Brown* (Ga.), 64 S. E. 1092; *Riggs v. Riggs*, 91 Kan. 593, 138 Pac. 628; *Montpelier v. Elmore*, 71 Vt. 193; *Alvey v. Hartwig*, 106 Md. 254; *McCloskey v. McCloskey*, 93 Mo. App. 393; *Stanton v. Willson*, 3 Day 37, 3 Am. Dec. 255; *Graham v. Graham*, 38 Colo. 453; *Pretzinger v. Pretzinger*, 45 Ohio St. 452; *Zilley v. Dunwiddie*, 98 Wis. 428; *Gibson v. Gibson*, 18 Wash. 489; *Holt v. Holt*, 42 Ark. 495; *McGoon v. Irvin*, 1 Pinn. 526, 44 Am. Dec. 409; *Thomas v. Thomas*, 41 Wis. 229; *Ditmar v. Ditmar*, 27 Wash. 13; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652; *Dolloff v. Dolloff*, 67 N. H. 512; *Rankin v. Rankin*, 83 Mo. App. 335; *Courtright v. Courtright*, 40 Mich. 633; *Glynn v. Glynn*, 94 Me. 465; *Tuggles v. Tuggles* (Ky.) 30 S. W. 875; *Steele v. People*, 88 Ill. App. 186; *State v. Rogers*, 2 Marv. 439. A well considered case is that of *Alvey v. Hartwig*, 106 Md. 254, where both the minority and majority opinions are discussed at length.

However, it is not the parties to the divorce suit alone.

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who are interested in the case at bar. The minor children, not parties to such suit, and the public, are interested. The government is interested to the extent that the minor children, if not supported, may become public charges, and the government is also interested in all of its subjects and such interest requires that these minor children be supported and maintained. The State of Delaware enacted a statute providing for enforcing the liability of the father for the future support of his infant children. In the case of *State v. Rogers*, supra, this liability was sought to be enforced by proceedings instituted by the State. Mrs. Rogers had obtained an *Act of Assembly* divorcing her from the defendant and awarding to her the custody of their minor child. In the opinion the court said, *inter alia*: "Parents by the law of nature are bound to support their issue, the father primarily as the head of the family, the liabilities of the wife being at common law merged in the husband, but the liability is common to both, and in case of divorce, though the relations of man and wife may cease, yet the liability to support their children exists and continues alike to each, unless upon the granting of said divorce there be embodied in the decree therefor some special provision for the children, who are consigned to the wife, to be paid by the husband, in which case, having been by the decree deprived of the society and custody of his children and made pay a specific sum, he may be discharged as to any liability, even under said statute. True it is, no action at common law could be brought against a parent to support his children in future, though he is liable for past support as to necessities, where he refuses to furnish them. * * *

We think this statute is clear and unambiguous as to its intent and meaning, and that under its provisions, the said William H. Rogers is bound to pay such sum as may be ordered by this court for the support of his minor children." In *Steele v. People*, 88 Ill. App. 186, it appears that the

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State's attorney instituted a proceeding in the county court to compel Steele to support his infant son. His defense was that the court had no jurisdiction as the superior court had granted to his wife a divorce and awarded to her the custody of the said infant son whereby he was released from all obligation to support the infant son. On writ of error to review an order requiring him to pay \$2 per week to the clerk of the county court for the support of the infant son, the court of appeals in the opinion says: "The only ground presented to this court upon which a reversal of the order of the county court is asked is that the county court had no jurisdiction in this matter. The reason assigned is that the jurisdiction of the superior court in said divorce proceeding was full and complete and exclusive. That position is not tenable. The duty which the father owes to the public to support an infant child is not affected by proceedings for divorce by the mother against the father. And the plaintiff in error has not in this case the excuse that the superior court decreed that he should pay to the mother any sum for the support of this child."

This authority disposes of the point of defendant, noted in the certificate of appeal, that the district court is without jurisdiction, and the further point that the district court had amended or modified the decree of divorce.

Our own statutes go far towards regulating the duties and control of parents over their infant children. Sec. 2993, R. L., as before shown, makes it the duty of the father to support his minor child or children, and under its provisions he is, so long as he discharges his duties to his wife and children, entitled to control the children and entitled to their services. Secs. 2936, 2937 and 2938, R. L., give to the court granting the divorce the power to determine which parent shall have the custody of the children, and when the husband is in fault to require him to contribute such sums as the court shall decree to the support of his

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wife, and such sums as the court shall decree to the support, maintenance and education of his infant children who may be awarded to the wife. Of course, in each instance, the sum allowed by the divorce court must be reasonable. Sec. 2940, R. L., under which the defendant is prosecuted, provides for different offenses: One for deserting the wife; one for neglecting his wife; and one for refusing or failing to provide for the support of his infant child or children under the age of sixteen years. The failure of the circuit judge to incorporate into the decree of divorce, or to make a further decree requiring the defendant to support his infant children, does not exempt the defendant from the operation of the statute last cited and does not affect the rights of the said infants or of the public to support for them from the defendant. The evidence shows that the defendant has not since the decree of divorce contributed anything to the support of his infant children.

We hold that the judgment of the district court does not modify or affect the decree of divorce; that the district court had jurisdiction to make the judgment and orders appealed from and complained of by the defendant; and that the judgment should be, and hereby is, affirmed.

Frank Andrade, C. F. Peterson, and A. M. Brown, City and County Attorney, and A. M. Cristy, First Deputy City and County Attorney, for the Territory.

Lorrin Andrews and W. J. Sheldon for defendant.

Syllabus.

IN THE MATTER OF THE CLAIM FOR COMPENSATION OF ICHIJIRO IKOMA AGAINST OAHU SUGAR COMPANY, LIMITED, AND KENICHI HARUMI.

No. 924.

RESERVED QUESTION FROM INDUSTRIAL ACCIDENT BOARD,
CITY AND COUNTY OF HOUOLULU.

ARGUED MAY 2, 1916.

DECIDED MAY 22, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—*Workmen's Compensation Act—construction.*

One purpose of the Workmen's Compensation Act is to provide compensation to a workman for injuries received while working in the business of the owner or operator thereof, from such owner or operator, regardless of questions of negligence, whether the injured workman is employed directly by the owner or operator of the business, or indirectly through a contractor, and the act must be broadly and liberally construed in order to effectuate such purpose.

SAME—*same—same.*

A sugar company let a contract to H to build a road-bed on its plantation to be used in its business, furnishing H with camps, tools and appliances, the work to be to the satisfaction of the company's engineer; the claimant, a workman employed by H who alone had the right to discharge him, was injured while working on the road-bed and filed with the industrial accident board his claim for compensation against the company and H; the question of the liability of the company was reserved to this court: Held, that the company is liable, it being an employer of claimant within the language and intent of the act.

OPINION OF THE COURT BY QUARLES, J.

(Robertson, C.J., dissenting.)

The claimant presented his notice of injury and claim for compensation under the Workmen's Compensation Act

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to the industrial accident board of the city and county of Honolulu against the Oahu Sugar Company, Limited, and Kenichi Harumi stating the nature and cause of injury as follows: "Total loss of the sight of the right eye, caused by a chip of iron from a drill entering the eye, while he was engaged in drilling for blasting purpose, the said Ichijiro Ikoma being at the time of the accident in the employment of Kenichi Harumi, an independent contractor, who was then carrying out a contract with the said Oahu Sugar Company, Limited, said drilling work being part of the work required and provided for by said contract. The undersigned therefore claims compensation under the provisions of the Workmen's Compensation Act." To the said claim the Oahu Sugar Company, Limited (for convenience sake hereinafter called the company), filed its answer wherein it appears that said company entered into a contract with the said Harumi on the 10th day of July, 1915, for the construction of a road-bed in Kipapa gulch, the company to furnish camps, tools and appliances, the said Harumi to pay for the powder, fuse and caps at cost thereof to the company. The amount of work was small, consisting of 4300 cubic yards, for which said Harumi was to receive sixty cents per yard. By the terms of the contract the work was to be done to the satisfaction of the company's engineer. The answer alleges that the claimant was employed and paid for his work by the said Harumi, who alone had the right to discharge him, claimant receiving \$1.25 per day. By the contract the work was to be done according to specifications set forth therein and pursuant to a survey and grade stakes on the ground. The answer of the company admits that the road-bed was intended for the use of the company in its business. Paragraph 2 of said answer is as follows: "That its business as set forth in its amended articles of incorporation is to engage in agricultural, manufacturing and mercantile pursuits in the Hawaiian Islands, or in connection therewith, includ-

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ing the cultivation of sugar cane, the manufacture of the same into sugar, and all business incidental thereto or which may be profitably conducted in connection therewith, the constructing and maintaining of irrigation works and pumping plants, dams and reservoirs, and the doing of all other things incidental to or proper in the business of supplying water to said corporation and others for irrigation and other purposes; the buying and selling of all goods, wares and merchandise; the dealing in the stocks and bonds of other corporations; the raising of cattle and live stock and all other ranch business; the purchase and hiring of vessels or steamers and operating the same; the operating of railways necessary or proper in connection with the business of a sugar plantation, and the purchase, construction and maintenance of railroad tracks, and of all property used in connection therewith, and the doing of all things, and the transaction of all business that may be lawfully done in connection with the purposes aforesaid or any one of them." The claimant filed a reply admitting the facts alleged in the answer of the company but denying that the company was entitled to an adjudication that it is under no liability to make compensation to him for the said injury so received. It was agreed in a written stipulation filed with the industrial accident board, and made a part of the record here, that the said road-bed was being constructed on land owned or leased by the company. The industrial accident board, by agreement of parties, has reserved to this court for determination the question of law as to whether or not the company, under the facts shown in the said claim, answer, reply and stipulation, is liable to make compensation to the claimant under the provisions of Act 221 of the Session Laws of 1915, commonly known as the Workmen's Compensation Act.

A solution of the reserved question requires a construction of the Workmen's Compensation Act (Act 221, S. L.

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1915), especially certain provisions therein, and the answer depends upon such construction. Among other provisions in said act we find the following:

"Section 1. This Act shall apply to any and all industrial employment, as hereinafter defined. If a workman receives personal injury by accident arising out of and in the course of such employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified."

In section 4 we find the following: "The rights and remedies herein granted to an employee on account of personal injury for which he is entitled to compensation under this Act shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury."

Section 6 provides: "No contract, rule, regulation, or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this Act."

Under the head of "Definitions" we find the following in section 60:

"(a) 'Employer' unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is insured it includes his insurer as far as applicable.

"(b) 'Workman' is used as synonymous with 'employee,' and means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. It does not include a person whose employment is purely casual or not for the purpose of the employer's trade or business, or whose remuneration from any one employer, excluding pay for over-time, exceeds thirty-six dollars (\$36.00) a week."

Section 64 contains the following: "(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

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"(b) This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it."

In determining the proper meaning and construction of any one section or provision of the act we must look to the act as a whole, determine its scope and object and general purpose, take the language used which is free from technicalities and construe that language broadly and liberally with the view of effecting the purposes of the act (*Young v. Duncan*, 218 Mass. 346; *Moore v. Lehigh Valley R. Co.*, 154 N. Y. S. 620; *State v. District Court*, 129 Minn. 176; *In re Rheinwald*, 153 N. Y. S. 598; *Sadowski v. Thomas Furnace Co.*, 146 N. W. 774). We must not only look at the act as a whole but must scrutinize it in all its parts; we must consider every provision, and in case of apparent conflict between two provisions we must so construe the act and each provision that effect will be given to each and every portion; we must give to the words used their usual and ordinary signification. In construing our act we get very little if any assistance at all from the English cases decided under the English Workman's Compensation Act. However, the English cases recognize a paramount principle which we recognize in the matter of construing our own act. For instance, in *Hoddinott v. Newton, Chambers & Co., Ltd.*, reported in 3 B W. C. C. 74, Lord Macnaghten said: "The only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification. The court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the act may seem to be." See Willis's Workmen's Compensation, pp. 1, 2, where, in the notes, a number of recent English decisions on this point are cited with quotations therefrom. Our act, by its terms, is to be liberally construed, and by authority the construction must be a broad one so as to effectuate the purposes of the act. A first reading of the act gives the

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impression that one of its main purposes is to take from the employee the right of action for injuries received, whether such injuries are caused by the negligence of his employer, by the negligence of a fellow servant, or by any act of his own, not wilful in its intent, to injure himself, but the paramount purpose appears to be to protect the workman and to provide compensation to him from his employer for all injuries received, regardless of questions of negligence and proximate cause. These purposes appear in the acts of the various States which have adopted a workman's compensation act. However, our act, in its terms, is unlike that of any of the States, and outside of the cardinal rule announced in our act and in the acts of the various States and in judicial decisions, that the act is to be broadly and liberally construed, we get no help in construing our act from the adjudicated cases either in England or in the different States. Section 4 of the English act provides that "Where any person in the course of or for the purpose of his trade or business contracts with any other person for the execution by or under the contractor of the whole or any part of the work undertaken by the principal the principal shall be liable to pay any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if the workman had been immediately employed by him." Under that provision the English courts, much conflict being found in their decisions, have had great difficulty in construing the word "undertaken," but in the later cases appear to have finally settled upon the conclusion that the owner of the business does not undertake to do the work which he contracts with another to do. The analogous provision in our act, found in section 60, subdivision (a), heretofore quoted, defining the word "employer," does not use the word "undertaken," so we are not confronted with the difficulty which the English courts have experienced in construing the English act.

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Was the company the employer, within the meaning of our Workmen's Compensation Act, of the claimant? Does the mere letting of the contract for building a short stretch of road-bed on the premises of the company exempt it from liability to the claimant? The company is, in the language of the act, "the owner or lessee of the premises" and we think "is virtually the proprietor and operator of the business there carried on," but "by reason of there being an independent contractor * * * is not the direct employer" of the claimant, who was "there employed." In our opinion the words "business there carried on" refer directly to the premises where a general business is conducted. The word "business" has a broad meaning. In *King's case*, 220 Mass. 290, the claimant was employed by a contractor who had a contract to deliver brick made by the Boston Brick Company to its customers. The industrial accident board, and the court to which an appeal was had, held that the claimant was working in the business of the Boston Brick Company and that the delivery of the brick was the business of the company.

In the case at bar the partial construction of a railroad on the premises of the company, although done by an independent contractor, was necessary and proper to the general business of the company, and constructing said road-bed we regard as business carried on by the company, and under the language of section 60, heretofore quoted, the company was an employer of the claimant. It is apparent from a study of the English decisions that if the word "undertaken" was eliminated from the English act the English courts would hold the owner liable for an injury to a workman on his premises who is directly employed by a contractor doing work necessary to the business of the owner. The case of *Luckwill v. Auchen S. S. Co.*, 6 B. W. C. C. 51, was decided by Judge Kelly of the county court at Barry, and appealed to the court of appeal and there not

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decided, the appeal being dismissed by Cozens-Hardy, M.R., with the following remarks: "It is clear that we cannot do anything for you in this court. We can only give you a passport to the House of Lords."

Our act was framed with the obvious intent to prevent the owners of a business from escaping liability where a workman on their premises, and while doing work necessary and proper to their business on such premises, is injured, although he may be working under an independent contractor. If this is not true how can we account for the use of the language defining "employer" to include the owner or lessee of premises, and the further words, "proprietor or operator of the business there carried on"? The act was intended to guard the interest of workmen on the premises of the owner of the business while doing work connected with or a part of such business and to prevent the owner of the business from escaping liability by contracts or sub-contracts of any kind.

Section 6 of our act, while it has but little if any bearing upon the merits of this case, does throw some light on the general intent of the act, especially in the particular now being construed, in that it provides that, "No contract, rule, regulation, or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this act." Bearing this intent in mind it is readily seen that the definition of "employer," found in section 60 in these words (which we repeat), "includes the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed," applies to the relation of the company to the claimant. Keeping in view the principle announced in the English case heretofore alluded to, that the act must not be limited by straining the language used "in order to bring

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in or to exclude any particular case," it seems evident that where work is done on the premises of the owner or operator of the business, although through an independent contractor, if the work is necessary to the business of the owner, or any part of that business, the owner or operator of the business there carried on is liable. It is agreed that the work done through the contractor in this case was done on the premises of the company; that it consisted in the partial construction of a railroad to be used by the company in operating its business; that the company had full power to build and use such railroad for the purposes of its business of producing sugar. The building of said road-bed is one step in the ultimate process of producing sugar, and its building is certainly a part of the company's business. The entire plantation, whether owned or leased by the company, is regularly and permanently used in its business—agricultural and industrial—of producing and manufacturing sugar for pecuniary gain. No part of these premises is permanently used in carrying on the business of the contractor who does not appear to be in the regular business of building railroads, and who was temporarily, with the consent of the company, on its premises, not to its exclusion therefrom, for the contractor was using its camps, tools and appliances and working under the supervision of its engineer. The construction of the road-bed being built (whether in whole or in part does not appear) was not merely connected with the business of the defendant but a part of its business. In the conduct of its business the company had to do many things, no one of which alone is sufficient to produce sugar, but all necessary to that end. Land must be cleared, ditches constructed, ground plowed, cane planted, growing crops irrigated and cultivated, a railroad or roads constructed to get the cane to the mill, the cane ground, the juice boiled and converted into sugar and then put into bags. The construction of the road-bed for

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the rails was as necessary as any of the other steps unless some more primitive way, for instance, by mule and cart, should be adopted in transporting the cane from the fields to the mill, as a part of its regular business. The company must have concluded as a matter of economy and pecuniary gain that it would not use the primitive mode of transporting cane but haul the same by means of its own railroad. It does not appear whether the company was primarily inaugurating a railroad system for hauling its cane or whether the road-bed being constructed by the contractor was a small part of a considerable railroad system theretofore existing on the company's plantation. The road being constructed on its own premises, although in part by an independent contractor, was for the purposes of the company's general business, and the company is, within the meaning and intent of the act, an employer of the claimant. If the company, notwithstanding the intent of the act to the contrary, can escape liability in the case at bar by reason of its contract with Harumi, then it may, simply by hiring men by contract to do its business and perform the different steps necessary in conducting its business, escape all liability and do that which the act intends should not be done, namely, leave the workman who may be injured in the conduct of its business to look to his immediate employer, whether solvent or insolvent, for compensation. The act, taking from the employee the right to sue for injuries received, certainly did not intend that his right to look to his employer should be frittered away and the beneficent provisions of the act taken from him by devices and subterfuges or by legitimate contracts entered into in good faith by the company with divers persons for conducting its business or parts thereof. But if the contention of the company is to prevail then any employer in this Territory may evade liability under the Workmen's Compensation Act by simply letting contracts for the doing of its business instead of hiring men by the day or month or year. If that contention

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is to prevail it is within the power of the company to escape all liability under the terms of this act, which it could do through contracts. For instance, it could contract the preparation of the soil for planting to A, the planting of its cane to B, the irrigation and cultivation of its crops to C, the cutting of its cane to D, the hauling of its cane to the mill to E, the grinding of its cane and boiling the juices to F, and the putting of the sugar into bags to G, or contract the doing of all these things to one person and escape liability under the act. Such construction would not only narrow the provisions of the act, but would defeat its intent and purposes in their entirety. By the terms of the act under consideration it is within the power of the owner or operator of the business carried on on his premises to protect himself by insurance against loss by reason of accidents to workmen who, although employed by an independent contractor, are working to make his business a success and doing that which is necessary to his business and the success of his business. And, after all, does it make any difference under the provisions of this act whether the sugar company hires its work done by contract or by day labor? Under the language of the act we are of the opinion that it does not; that the act is so broad in its scope, and its purposes and intent so manifest from the language used by the legislature, that it covers the injuries of workmen, regardless of how those injuries occur, if such injuries are sustained while working on the premises of the owner of a business and in the doing of any part of such business. The act guards zealously against evasions of liability by employers through the letting of contracts for the conduct of their business or any parts thereof. The premises in question were not used in the business of building railroads but in the business of producing sugar, and the contractor building the road-bed was only there incidentally, casually, and was doing part of the company's business and assisting the owner of the busi-

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ness "there carried on," and such owner is not exempt from liability.

We are not called on in the case at bar to pass upon the validity of any provision of the Workmen's Compensation Act but only to construe the provisions of that act necessary to determine the question of the liability of the company to the claimant for the injuries received by the latter. The reserved question does not submit to us for our determination the question as to whether or not both the company and the contractor (Harumi) are liable, and we do not pass on the question as to the liability of the contractor as we do not regard that question as before us.

The reserved question is answered in the affirmative.

E. A. Douthitt for claimant.

W. T. Carden, Second Deputy City and County Attorney, *amicus curiae*.

F. W. Milverton (*Thompson, Milverton & Cathcart* on the brief) for Oahu Sugar Co., Ltd.

DISSENTING OPINION OF ROBERTSON, C.J.

I respectfully dissent. There is no doubt that the Workmen's Compensation Act is to receive a liberal interpretation with the view to effectuate the policy and intent which the legislature has manifested by its enactment. But it is not to be construed upon the theory that it furnishes to an injured workman a double remedy against either or both of two distinct persons when it evidently proceeds upon the theory that there is but one single employer and the workman's remedy is against that employer. There is no doubt that the claimant in this case is entitled to compensation under the act. The question is whether, under the circumstances shown, the company or the independent contractor was the claimant's employer. There is no doubt that the right of an injured workman to look to his em-

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ployer for compensation is not to be "frittered away and the beneficent provisions of the act taken from him." But the question may still remain, which of two persons was the man's employer within the purview of the act. It seems to me that the statement made in the majority opinion that "where work is done on the premises of the owner or operator of the business, although through an independent contractor, if the work is necessary to the business of the owner, or any part of that business, the owner or operator of the business there carried on is liable," merely begs the question. If the owner of the premises is also the owner of the business in which the workman was employed of course he is liable. If the statement quoted is intended to lay down as the test of liability the fact whether "the work is necessary to the business of the owner, or any part of that business," then, I say, it is not the test which the legislature has prescribed. The act defines "Workman" as "any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer." Conversely then, the employer is the person who hires, pays, controls and has the right to discharge the employee. It is an agreed fact in this case that the corporation had no control over the workman, nor the right to employ or discharge him. But the statute contains a special provision applicable to cases where work is being done or a business carried on by an independent contractor upon the premises of another. In such cases "'Employer' * * * includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed." The word "virtually" is used in contradistinction to "actual" or "real," on the one hand, and "nominal" or "apparent," on the other. In the paragraph just quoted it obviously refers to the business of the inde-

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pendent contractor—that in which the workman was employed and in the course of which he was injured. And in such cases the owner or lessee of the premises upon which that work or business was being carried on would be regarded as the employer of the workman and responsible as such in case, and only in case, he was, under the circumstances, “virtually the owner or operator of the business there carried on.” This view accords to the language of the statute its ordinary signification. It is not a strained construction, nor does it fritter away any rights of workmen. The Massachusetts act under which *King’s Case*, 220 Mass. 290, cited in the majority opinion, was decided, is so obviously different from the statute of this Territory that the decisions under it are of no value as precedents here. See 1 Bradbury’s *Workman’s Compensation* (2nd ed.) 537. It appears in the case at bar that upon the premises in question, of which the company is the owner or lessee, there were two businesses being carried on, namely, the general business of the sugar company, of which it is the actual proprietor, and the particular business of the contractor, of which he is the actual operator. The company, nevertheless, would be liable if it was “virtually the proprietor” of the business there being carried on by the contractor, notwithstanding that it was not the direct employer of the claimant. There is no doubt that the company has power under its articles of incorporation to construct, build and equip a railroad to be used upon its plantation, and it must be conceded that if the company itself had undertaken the work of constructing the road-bed in question it would have been liable under the act to compensate workmen injured in the course of the work. The query is, however, whether, under circumstances such as we are dealing with here, the “business” contemplated by section 60 of the statute is the general business of the owner of the premises where the accident occurred, or the particular business of the con-

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tractor in the operation of which the workman was employed. Counsel for the claimant contends that the company was virtually the proprietor or operator of the business in the carrying on of which the road-bed was being constructed for the reason that it was work which the company itself had the right to do; that the work was being done upon its premises; that it furnished the tools and appliances needed in the construction work; and that the work was required to be done to the satisfaction of the company's engineer. The deputy city and county attorney, who also argues that the company should be held liable, lays principal stress upon the facts that the contract did not call for the construction of an entirely completed article in which the company had no interest until delivery over to it, and that the work was of a character within the scope of the company's business, and the railroad was being built for use in its business. Counsel for the Oahu Sugar Company draw a distinction between a contract made by the company for the operation of its, or a part of its, ordinary business of growing sugar cane and manufacturing sugar, and one for some matter incidental thereto—an instrumentality—such as the construction of a railroad which would not be used by the company in its business until it had been completed. Their contention is that while in the first case the company might be liable to make compensation to an injured workman, it would not under the latter. But the distinction put by counsel does not furnish a satisfactory test since the principal, under certain circumstances, might well be regarded as the virtual proprietor of the business in which the instrumentality was being constructed. If, in the case at bar, for example, the contractor was shown to be the mere servant or dummy of the company, and that the laborers performed their work under the immediate direction of its engineer, the company could very properly be regarded as the "virtual operator" of the business. In other words, the

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company would be virtually the proprietor of the business there carried on of which the independent contractor was the nominal or apparent owner. The fact that the corporation agreed to supply the necessary tools and appliances would seem to be unimportant. This is conceded by the *amicus curiae*. The genuineness of a *bona fide* contract would not be impaired because the compensation going to the contractor was not entirely money, but partly money and partly materials. The record does not show that the contractor did not carry insurance, and in the absence of anything to the contrary it must be assumed that he is solvent and responsible, and not a mere man of straw unable to pay the compensation to which the claimant is entitled. Upon the facts of this case I am of the opinion that the Oahu Sugar Company was not virtually the proprietor or operator of the business in which the claimant was employed, and that the contractor was the responsible employer of the claimant. This view is in harmony with, and is supported by, the provision of paragraph (e) of section 60 of the statute that " 'Employment,' in the case of private employers, includes the employment only in a trade or occupation which is carried on by the employer for the sake of pecuniary gain." The employer for whose "pecuniary gain" the construction work was being done was undoubtedly the contractor, and the fact that the railroad, when completed, is intended to be operated by the company for its pecuniary gain does not show the contrary. The pecuniary gain to be derived from doing the construction work is one thing, and that to be obtained from the operation of the completed railroad is another. The one would accrue to the contractor, the other to the company.

In my opinion the reserved question should be answered in the negative.

Syllabus.

YIP LAN v. INOAOLE AHULII.

No. 934.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED MAY 11, 1916.

DECIDED MAY 23, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LANDLORD AND TENANT—*covenant for renewal—exercise of option by lessee.*

A covenant to renew a lease gives the lessee an option which ordinarily he must act upon by giving notice of his intent to renew at or before the end of the term demised. But time is not of the essence of the agreement, unless made so, and the notice being for the benefit of the lessor may be waived by him.

SPECIFIC PERFORMANCE—*covenant to renew lease.*

Equity will decree the specific performance of a covenant to renew a lease where the lessee, within a reasonable time after the expiration of the lease in exercise of the option pays, and the lessor accepts and retains, the rent for the first period upon a new term.

SAME—*parties—decree.*

Persons who, after the making of a contract to convey or lease land, acquire an interest in the land from the vendor or lessor are necessary parties to a bill for the specific performance of the contract. In the absence of a necessary party, the appellate court, if it cannot make a decree which will finally dispose of the controversy, may remand the cause for the purpose of bringing him in.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is a suit to compel specific performance of a covenant contained in a lease for its renewal. The respondent appeals from a decree entered in the court below granting the relief prayed for.

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By the lease in question the respondent demised to one J. Mahiai Kaneakua certain land situate at Waiakoa, Kula, Island of Maui, for the term of ten years commencing the first day of June, 1904, at an annual rental of two hundred and fifty dollars payable semi-annually. The lease was dated January 11, 1901, and recorded on April 1, 1901. For some unexplained reason the rental was thereafter increased to two hundred and sixty-five dollars. The bill averred, and the answer admitted, that Kaneakua assigned the lease to one Young Nap, who, in turn, assigned it to one Jun Kum Sou. The bill also alleged that on February 14, 1906, the said Jun Kum Sou assigned to the complainant. This was denied in the answer. At the hearing the complainant introduced in evidence two instruments in the form of receipts for money, dated respectively February 14, and May 7, 1906, and signed by Jun Kum Sou, the latter of which included the statement "I hereby transfer to Yip Lan the lease of land, the building, implements and everything." Counsel for the respondent contends that these instruments were erroneously received in evidence because they were unstamped, citing *O. R. & L. Co. v. Kaili*, 22 Haw. 693. No objection was made to the admission of the evidence at the hearing and the point comes too late when raised for the first time on this appeal. In this connection, it may be pointed out, that there was no real dispute as to the tenancy of the complainant under the original lease. The husband and agent of the respondent testified, and a number of receipts for rent which were introduced showed, that the complainant had held and had been recognized by the respondent as her tenant for a number of years, thus corroborating the complainant's testimony that he had occupied the premises since he acquired the lease in 1906.

It is contended that the court erred in refusing to allow

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the respondent to prove that the complainant was bankrupt. It appears from the record that counsel for the respondent started to question the complainant on cross-examination as to whether he owned property in the Territory. An objection having been interposed, counsel stated that he intended to prove that the complainant is bankrupt, meaning, apparently, insolvent. But the court made no definite ruling, no offer of proof was made, and counsel apparently voluntarily abandoned further examination on the point.

It is contended that as the complainant neglected to exercise the renewal option at or before the expiration of the original term he is not entitled to have specific performance of the covenant. The term expired on June 1, 1914. There was evidence showing that on June 2, the complainant gave one Ah Chip one hundred and thirty-two and a half dollars to be remitted to the respondent for the half-year's rent, but it was not until the 10th of June that the money was sent by post-office money orders. On June 6 the complainant received from Ahulii a letter dated June 1, in which the writer stated that the lease had expired, offered to give Yip Lan a new lease at an annual rental of three hundred dollars, asking him to "come at once" if he was agreeable to the new terms, and saying "I will wait for you for one week only." The complainant seems not to have replied to the letter, but he went personally over to Kaupo, arriving at Ahulii's place on June 15. Ahulii and his wife being present, the complainant requested a renewal of the lease. Ahulii replied that it was too late, and that one Fat On, who also was there, had offered three hundred dollars a year. At that time the rent which Yip Lan had remitted had not been received, but, upon being shown the post-office receipts, Ahulii went over to the post-office and got the orders, apparently on the next day. He retained the money and sent Yip Lan a receipt for it. Yip Lan returned

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to his home without having received a new lease. On June 19 the respondent executed a lease of the premises to Fat On for the term of ten years from June 1, 1914, at the annual rental of four hundred dollars. At the same time the Ahuliis seem to have made an arrangement with Fat On whereby Yip Lan should have the right to continue in possession of the land until January 1, 1915. In a letter dated June 22, 1914, addressed to one Antony Fernandez at Waiakoa, Kula, Ahulii referred to the leasing of the land to Fat On, and stated that he had demanded that Yip Lan have the right to remain on the land until January 1, 1915, in order that he might take off his crops, and that he had paid Fat On two hundred dollars for the purpose. He referred also to the payment by Yip Lan of one hundred and thirty-two and a half dollars, that the balance to be paid would be sixty-seven and a half dollars, and said, "if he consents to return what I paid then you are to give him this receipt, and if not, you are to return that receipt, and I will return these money orders." The paper which was enclosed with the letter contained the following:

"Kaupo, June 19, 1914.

"By this I hereby grant permission to Yip Lan, from this day to the 1st. day of Jan. A. D. 1915, to take his things and leave everything appertaining to the land of Mrs. Inoaole Ahulii Jr. for myself.

"Yours truly,
"Fat On

"Per Geo. J. Kunukau

"Kaupo, June 19, 1914.

"Received by me two hundred dollars (\$200) from Joseph Ahulii Jr. for this six months, beginning from June 1, 1914, to Jan 1, 1915.

"Fat On."

There is no evidence that the complainant paid the sixty-seven and a half dollars or otherwise acceded to the arrangement made between the Ahuliis and Fat On. On November

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23, 1914, the complainant made another remittance of one hundred and thirty-two and a half dollars for rent for the next succeeding half year but it was not accepted by the respondent. The complainant remained in possession of the premises for several months when he was put out by the sheriff, other litigation having intervened. See *Ahulii v. Yip Lan*, 22 Haw. 708; 739.

A covenant in a lease for its renewal is a valid agreement of which equity may compel specific performance at the suit of the lessee. A covenant to renew, as distinguished from a privilege to extend, a lease gives the lessee an option which he must ordinarily act upon by giving notice of his intent to renew at or before the end of the term demised. But time is not of the essence of the agreement, unless made so, and the notice, being for the benefit of the lessor, may be waived by him. In the lease under consideration there was no express requirement that the lessee should give notice at or within a specified time. Time was not of the essence of the agreement. By his letter of June 1 the lessor notified the lessee to signify his desire within a week of that date. The lessee, however, remained in possession, forwarded six months' rent, and on the 15th of June personally notified the lessor that he desired the renewal. Up to that time the lessor had not altered her position, and there was nothing to prevent her from complying with her agreement. The option was exercised within a reasonable time, both parties were bound by it, and the lessee became entitled to have the lease renewed on the terms agreed upon. *Caley v. Thornquist*, 89 Minn. 348; *Chittenden v. Western Union Tel. Co.*, 154 Mich. 1; *McBrier v. Marshall*, 126 Pa. St. 390; *Holton v. Andrews*, 151 N. C. 340; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25; *Myers v. Silljacks*, 58 Md. 319, 331.

The lessee had paid the rental for the first six months of the new term, and, by accepting it, the lessor waived the

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requirement of notice at or before the end of the term. The lessor having accepted and retained the money could not thereafter deny the lessee's right to a new lease and give a valid lease to another who had notice of the lessee's rights in the premises. The lessor could not be permitted to take the lessee's money and then say to him "you are too late." The subsequent attempt of the Ahuliis to devote the money received from Yip Lan to a purpose other than that for which the payment was made, namely, for a six months tenancy under Fat On, was neither authorized nor ratified by Yip Lan, and, therefore, was not binding upon him. No contention has been made by counsel for the appellant that the appellee had voluntarily abandoned or waived his right to demand a renewal of the lease. His action in paying the rent at the rate specified in the covenant plainly shows that he intended to exercise the option.

The contention of the appellant that the decree requiring the execution of a lease to the complainant would be nugatory since Fat On who holds a lease of the premises from the respondent has not been made a party to this suit is well taken. The record shows, moreover, that Fat On has executed certain sub-leases to others, who, presumably, are now in possession of the land, but have not been made parties. "Persons who, after the making of a contract for the conveyance of lands, acquire interest in the lands derived from the vendor, are necessary parties to a bill for the specific performance of the contract." 20 Enc. Pl. & Pr. 415. See also Pomeroy on Contracts (2nd ed.) Sec. 493; 36 Cyc. 761. The decree in this case, in order to be effective, should extinguish the legal rights in the land of Fat On and his sub-lessees. In case of the non-joinder of an indispensable party "the appellate court may, in its discretion, if it cannot make a decree which will finally and properly dispose of the subject-matter of the controversy in the absence of a party, remit the cause for the purpose of

Quarles, J., concurring.

bringing him in." 1 Beach Mod. Eq. Pr., Sec. 78.

The decree is reversed and the case remanded to the circuit judge for further proceedings consistent with this opinion.

E. Vincent (*D. H. Case* with him on the brief) for petitioner.

E. Murphy for respondent.

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion that the judgment must be reversed on the ground stated in the opinion of the court. However, I am of the opinion that the complainant's bill should be dismissed for want of equity, in that it appears in the record and by evidence offered on behalf of the respondent, and refused by the court, that the covenant sought to be specifically performed was waived by the complainant and abandoned by mutual consent of both parties. Failure to perform the covenant, if excused by both parties, will defeat a suit for specific performance. 36 Cyc. 699, 700, and authorities cited in notes. "The right to enforce an agreement in equity is lost when the party seeking performance has consented to a rescission of the contract." 26 Am. & Eng. Ency. L. 134, and authorities cited in notes. When the contract has been abandoned by the party seeking specific performance, or by both parties, specific performance will not be decreed. 26 Am. & Eng. Ency. L. 135, and authorities cited in notes.

The history of the abandonment or waiver suggested, contained in the record, is as follows: June 1, 1914, at the expiration of the option to release contained in the old lease, respondent's husband, J. Ahulii, acting for respondent, wrote to the complainant informing him, in substance, that the lease had expired, and offering to give him a new lease at the increased rental of \$300 per year, the complain-

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ant to bear the expenses of the papers for the new lease and asking the complainant to come at once if this was agreeable as other parties were wanting the land at a rental of \$300 per year. The letter closes with this language: "I wrote to you before but it was returned, and I sent it again to John Miguel, the same letter, and to this day you have made no reply, I will wait for you for one week only, and if I get no answer, then the land will be given to one of those who asked me for the land." The complainant testifies that he received the said letter on the 6th day of June; he also testifies that he asked one Antone Fernandez to write to J. Ahulii, husband of respondent, and that Fernandez did so; he further testifies that he was present when the letter was written, had an interpreter with him and had the letter interpreted to him. This letter was dated June 8, 1914. In this letter, which was offered by the respondent in evidence but refused by the court on the ground that said Fernandez was not shown to be the agent of complainant, Fernandez informs Ahulii that complainant is agreeable to pay a rental of \$300 and is ready to send \$150 next week for six months' rent. This letter should have been received in evidence as it was unquestionably written by the agent of Yip Lan. The evidence shows further that Antone Fernandez, also known by the name of Akoni, on the 15th of June, 1914, went with Yip Lan and another Chinaman named Tam Choy, to the respondent. Yip Lan and Tam Choy testify that Yip Lan on this occasion agreed to pay rental of \$300 per year, and that Ahulii said, "You are too late." The week in which the respondent had voluntarily extended the privilege to Yip Lan to receive another lease at the increased rental of \$300 had expired one week before the visit of Yip Lan, Fernandez and Tam Choy to the respondent. On this occasion Yip Lan informed Ahulii that he had sent to him post-office orders for \$132.50, Ahulii claiming that he had not received them. On the next day it appears that Ahulii

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went to the post-office and received these post-office orders. Four days later, on the 19th, the respondent leased the premises in dispute to Fat On at a rental of \$400 per year, and four days afterwards, June 22, Ahulii sent to Fernandez, agent for Yip Lan, the writing in which Fat On agreed that Yip Lan could remain on the premises until the first day of January, 1915, which is set forth in the opinion of the court, and also the receipt given by Fat On to Ahulii for \$200 for six months' rent from June 1, 1914, to January 1, 1915, set forth in the opinion of the court. In the letter transmitting this agreement and receipt from Fat On to Fernandez Ahulii used this language: "The money from Yip Lan I have received that in the form of two money orders of the value of \$132.50, and this is what remains: if he consents to return what I paid" (to Fat On) "then you are to give him this receipt, and if not, you are to return that receipt, and I will return these money orders. Only yesterday did I receive this letter from Yip Lan. If the Chinaman Yip Lan consents to pay back my money. The amount of \$67.50 is the balance of what he is to pay me." This letter was received in evidence and shows, to my mind conclusively, that the respondent never received the \$132.50 as rent from Yip Lan from June 1, 1914, to December 31, 1914, on the old lease.

I do not think that Ahulii acted properly in regard to making an arrangement for Yip Lan with Fat On, but he evidently did it through kindness of heart and to prevent Yip Lan from losing his growing crops and to give him the opportunity to mature and harvest them. Yip Lan should have returned the Fat On receipt unless he claimed an advantage under it. Under the circumstances I regard it as clear, from the evidence in this case, that Yip Lan abandoned the covenant in the lease for renewal on the terms stated in the old lease, was willing to take a new lease on different terms, and, after he found that Fat On would pro-

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cure a lease or that he could not get a new lease from Ahulii, he then consulted Mr. Tavares, an attorney, and was advised that he could hold under the original covenant. The complainant introduced in evidence some carbon copies of letters, without the signature, said to have been written by Mr. Tavares, and this is indicated in the evidence of Yip Lan,—the one is dated June 20, and the other June 24, 1914,—in which respondent is informed by Tavares that Yip Lan proposes to stand on the original covenant. In my opinion it was too late for him to do so as the evidence of waiver of that covenant is complete, and by retaining the Fat On agreement and receipt to protect his own possession, Yip Lan became, in law, in my opinion, the tenant of Fat On, and should be held to have agreed to the arrangement made by Ahulii with Fat On for the remaining months of 1914, and is not entitled to specific performance of the covenant for renewal in the old lease. The covenant for renewal in the old lease was merely an option which should have been exercised at or before the expiration of the lease, June 1, 1914. Ahulii's letter of June 1 shows that he regarded the lease entirely as terminated, and Yip Lan's actions in the premises show that he did too, but afterwards, on advice of an attorney, sought to go back and stand upon the said covenant in the old lease. A court of equity should not decree specific performance of said covenant under the facts and circumstances shown by the record in this case.

Syllabus.

ANTHONY LIDGATE AND H. M. VON HOLT, TRUSTEES UNDER THE WILL OF CHARLES NOTLEY, DECEASED, v. EMMA DANFORD, MARIA NOTLEY HUGHES, DAVID F. NOTLEY, PATRICK GLEASON, TRUSTEE FOR DAVID F. NOTLEY, VICTORIA M. K. VANNATTA, LILY NOTLEY HEEN, WILLIAM K. NOTLEY, JOHN K. NOTLEY, HENRY WATERHOUSE TRUST COMPANY, LIMITED, ADMINISTRATOR OF THE ESTATE OF MARY K. NOTLEY, DECEASED, AND H. M. VON HOLT, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF MELISA NOTLEY, DECEASED.

No. 931.

SUBMISSION WITHOUT ACTION.

ARGUED APRIL 18, MAY 16, 1916.

DECIDED MAY 31, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

WILLS—construction—conflicting clauses—general and specific provisions.

A conflict between two provisions in a will is not to be regarded as irreconcilable unless, after the application of the several rules of construction, substantial harmony is found impossible. Where there is an inconsistency between a general and a specific provision both may operate, the latter upon the property named in it and the former upon other property.

SAME—distribution per capita.

Where the income from certain property devised in trust is directed to be paid to the children and certain named grandchildren of the testator in equal shares the beneficiaries will take *per capita* unless the will shows a different intent on the part of the testator.

SAME—refusal of widow to accept testamentary provision—acceleration.

Where a will provides for the payment to the testator's widow for life of a share of the income of the residue of the estate

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which is devised in trust, such income, upon her death, to be paid to other beneficiaries, and the widow elects to take her dower, the other beneficiaries become immediately entitled to receive all the income from so much of such property as may remain.

WORDS AND PHRASES—“*share and share alike*.”

The phrase “share and share alike” ordinarily imports an equal division in severalty.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

This is a submission upon agreed facts of a controversy which has arisen under the will of Charles Notley, late of Paauilo, Hawaii, deceased. The provisions necessary to be considered in the determination of the questions raised are included in the sixth paragraph of the will which reads as follows:

“Sixth. All the rest, residue and remainder of my estate, real, personal or mixed, and wherever situate, I give, devise, and bequeath unto the said Thomas Rain Walker and Anthony Lidgate, in trust nevertheless for the uses and purposes herein set forth, that is to say: to pay the rents, issues and profits arising from and out of my said estate in manner following:

(A) “One-sixth thereof to my wife Mary K. Notley during the term of her natural life, such payment to be in lieu of her dower right in my estate, and from and after the death of my said wife, the said one-sixth share or part of said income shall be divided among the surviving devisees named in this my will in the shares and proportions hereinafter set forth and limited to each of them.

(B) “One-sixth thereof to my son William during the term of his natural life, and from and after the death of my said son William then to Melisa, the wife of said William, during the term of her natural life; and from and after the death of the said Melisa, the said one-sixth share or part of said income shall be divided among the surviving devisees share and share alike.

(C) “One-sixth thereof unto the children of my son Charles Notley Jr., named John, Victoria Maria, Lilly and

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William, share and share alike. And I hereby direct my said trustees not to pay any of said share of said income unto any of the above named children of my said son Charles Notley, Jr., until such time as each of them, being males, shall arrive at the age of twenty-one years, and being females, shall arrive at the age of eighteen years; and that in the meantime and until the happening of such event as to each of said children, I direct my said trustees to keep said one-sixth share of said income invested in such securities as they or their successors may think proper, and the income, rents, issues or profits thereof shall be divided equally among said children upon the arrival of them at the age of twenty-one years and eighteen years respectively as hereinbefore limited. And in the event of the death of any of said children before the arriving at the ages aforesaid, or in the event of their death after the arrival at the ages aforesaid, the heirs of such children shall take the share of the child so dying.

(D) "One-sixth thereof unto my daughter Maria, the wife of Thomas Hughes, during the term of her natural life, free from all control or liability of the marital rights of any husband.

(E) "One-sixth thereof to my son David Fyfe Notley, during the term of his natural life, and

(F) "One-sixth thereof to my niece Emma Danford, nee Mullinger, during the term of her natural life free from all control or liability of the marital rights of any husband.

(G) "And from and after the death of all my said children and my said niece Emma Danford, nee Mullinger, I hereby direct my said trustees or their successors to convey all of my estate among the heirs-at-law of my said children William, Maria, David Fyfe, and my said niece Emma Danford, nee Mullinger, and the children of my said son Charles Notley, Jr., namely: John, Victoria Maria, Lilly and William, share and share alike.

(H) "And I direct, that until the death of all the legatees last named, the income accruing from said trust estate, shall, until such event happen, be paid among the heirs at law of all such as may have died before the death of the survivor of said last named legatees."

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For the sake of convenience in this opinion the several clauses after the first have been designated by letters of the alphabet. The parties to this submission, besides the trustees under the will, are the beneficiaries named in clauses C, D, E, and F; the administrator of the estate of the widow who was named in clause A; the administrator of the estate of Melisa Notley who was named in clause B; and Patrick Gleason, trustee for the aforesaid David Fyfe Notley.

The statement of facts shows that the testator died on May 2, 1902; that the testator's widow elected to receive her dower in the estate instead of the testamentary provision; that the income has therefore been divided into fifths instead of sixths as provided in the will, and until the death of Melisa Notley was paid over to the several beneficiaries under clauses B, C, D, E, and F; that the children of Charles Notley Jr. named in clause C have each attained the age of twenty-one years; that William Notley died on August 21, 1913, without issue, leaving surviving his mother and his wife as his heirs at law; that Melisa Notley died on October 12, 1915; that Mary K. Notley, the testator's widow, died on November 16, 1915; and that one-fifth of the income of the estate accruing between the date of the death of Melisa and the date of this submission (February 29, 1916) amounted to \$2540.98.

The controversy is as to who is entitled to the share of the income which was payable under clause B to the son William and his wife Melisa during their respective natural lives since the latter's death. It is claimed by the administrator of the estate of Mary K. Notley and the administrator of the estate of Melisa Notley, that the said Mary and Melisa, as heirs at law of William Notley, took under clause H, on the death of William, vested interests in one-fifth of the income for the period ending with the final distribution of the trust estate under clause G, the enjoyment

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of such interest being postponed until the death of Melisa. The beneficiaries named in clauses C, D, E and F claim that under clause B they are entitled to said share of the income for said period from the death of Melisa to the final distribution of the estate. It is further claimed by the beneficiaries named in clauses D, E and F that under clause B they are entitled to three-fourths of said share of the income during said period, and that the beneficiaries named in clause C are entitled only to the remaining one-fourth of said share to be divided between them. It is further claimed by the beneficiaries named in clause C that under clause B they are each entitled to one-seventh of said share of the income, and that the beneficiaries named in clauses D, E and F are entitled to only one-seventh thereof each.

The first question presented is as to the proper construction of the language of clause B that "from and after the death of said Melisa, the said one-sixth share or part of said income shall be divided among the surviving devisees share and share alike," when considered in connection with the apparently conflicting provision of clause H, "that until the death of all the legatees last named, the income accruing from said trust estate shall, until such event happen, be paid among the heirs at law of all such as may have died before the death of the survivor of said last named legatees." On behalf of the administrators of the estates of the two widows it is argued that, ignoring the inaccurate use of the word "devisees" in clause B and of the word "legatees" in clause H, there is no real inconsistency between the two clauses referred to; that the testator, in effect, defined the words "surviving devisees" of clause B as meaning "the heirs at law" mentioned in clause H; that as the heirs at law of the son William will partake in the final disposition of the estate under clause G there is nothing in the will to warrant taking the income now in dispute from those heirs pending the death of the last surviving child; that the

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clearly expressed intention that the heirs at law of each beneficiary should take the share of their respective ancestors should not be made to yield to the alleged ambiguous phrase "surviving devisees;" that the general intent shown by the entire will that the estate should be kept intact for the benefit of the several beneficiaries and their respective heirs should prevail over the ambiguously expressed particular intent shown by the language of clause B; and that if the two clauses are irreconcilable the later in position should prevail over the earlier. We think these contentions cannot be sustained. In clause A, by which the testator gave to his wife, in lieu of dower, one-sixth of the income of the property devised and bequeathed to the trustees during her life, it was provided that that share, upon her death, "shall be divided among the surviving devisees named in this my will in the shares and proportions hereinafter set forth and limited to each of them." It is very evident that by the words "surviving devisees" there used the testator meant the beneficiaries to whom shares of the income were given in and by the succeeding clauses of paragraph 6 in certain proportions therein set forth and limited to them respectively. And it is obvious, we think, that the words "surviving devisees" in clause B were used in a like sense, though the additional words used in clause A were not repeated. Where the intention of the testator can be ascertained from his will the inaccurate use of words will not prevent the carrying out of his intent. The point then is whether the share of income disposed of by clause B, from the death of Melisa, should go to the surviving devisees, so-called, named in the four following clauses of the paragraph or to the heirs of William. There is an apparent conflict between clauses B and H, and if they cannot be reconciled the later will prevail over the earlier unless that would defeat the manifest intent of the testator gathered from the will as a whole. *Hapai v. Brown*, 21 Haw. 499, 505. But it is in-

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cumbent upon the court to reconcile the repugnancy if that can be done. A conflict between two provisions in a will is not to be regarded as irreconcilable unless, after the application of the several rules of construction, substantial harmony is found impossible. We are satisfied that the two provisions can be harmonized upon the rule of construction that where there is an inconsistency between a general and a specific provision the latter will prevail regardless of the order in which it stands in the will, as it generally will be a reasonable presumption that the testator intended that the specific provision would operate upon the property named in it and the general provision upon other property. *Paiko v. Boeynaems*, 22 Haw. 233, 240; *Magoon v. Kapio-lani Estate*, 22 Haw. 510, 514. The rule that in case of doubt a will should be construed in favor of a general or primary intention rather than a particular or secondary one does not apply "where there is a clearly expressed intention to effect another purpose distinct and different from the general intention or object, as in such a case the particular intention will prevail." 40 Cyc. 1393. See *Pickering v. Langdon*, 22 Me. 413, 430; *Graham v. Graham*, 23 W. Va. 36, 42; *Behrens v. Baumann*, 27 L. R. A. N. S. (W. Va.) 1092. Clause B differs from clauses D, E and F in that by it provision was made for the wife of William, whereas no such provision was made for the spouses of the daughter, son or niece named in the other clauses. By it also the testator made a special provision in regard to the disposition of the share of the income there given to William and Melisa upon the death of the latter. That provision was intended to operate upon that share alone while the general provision of clause H would apply to the shares covered by clauses D, E and F. There is a specific provision in clause C which controls the devolution of the shares given to the grandchildren therein named. Clauses B and C each made a final disposi-

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tion of one-sixth of the income, and neither required the supplementary provision of clause H to make it complete. The application of the rule of construction above referred to, we have no doubt, will accomplish the intent which the testator has disclosed by his will. The beneficiaries named in clauses C, D, E and F are entitled to receive from and after the death of Melisa Notley the share of income given by clause B.

The next question to be decided is as to how that share is to be divided among those whom we hold are entitled to it. The argument made on behalf of the beneficiaries named in clauses D, E and F is that, taking the will as a whole, there is apparent a general intention on the part of the testator to treat the grandchildren named in clause C as standing in the place of their father, Charles Notley, Jr., to whom nothing was given by the will, and to give to them the proportion of the income which it would be supposed would otherwise have been given to their father, to wit, a one-sixth share, and an equal division with the other children and niece under clause B after the death of Melisa. It may be conceded that such an intent might likely have been entertained by the testator, and that a provision expressing such an intent would reasonably have been expected under the circumstances. But, as it was remarked in *Hall v. Hall*, 140 Mass. 267, 270, "the greater reasonableness of a different disposition, or a consideration of what it is likely, on general principles, that a testator would have wished, cannot be allowed to change the interpretation of the words used, if the meaning is plain apart from such considerations;" and, as said in *Wells v. Newton*, 67 Ky. 158, "the assumed unreasonableness of giving to a grandchild as much as to a child can not control or neutralize the construction of the testamentary language." The rule that a primary or general intent will, in case of conflict and doubt, prevail over a secondary or particular intent has more influence in

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deciding a question as to what property or what estate in certain property certain beneficiaries are to take than in determining what persons are to take under a will. It is necessary, therefore, to examine the will with the view to ascertain whether, as a whole, it manifests an intent on the part of the testator that the children of the son Charles should stand, as it were in their father's place and together take, under clause B, a share equal to that of each of the beneficiaries named in clauses D, E and F, as against the language of clause B that the share of the income given to William and Melisa shall, upon the death of the latter, be divided among the other beneficiaries "share and share alike." It is true that the share of income given to the children of Charles together by clause C is the same proportion (one-sixth) as that given to each of the testator's children and his niece by the other clauses. But we find nothing in the will to indicate that that principle of division was intended to operate generally or in special connection with the final sub-division of the one-sixth of the income under clause B. The words "the said one-sixth share or part of said income shall be divided among the surviving devisees *share and share alike*," used in clause B, are in rather sharp contrast to the words "the said one-sixth share or part of said income shall be divided among the surviving devisees named in this my will *in the shares and proportions hereinafter set forth and limited to each of them*," used in clause A. We see nothing in the will to indicate that the different phraseology was not used advisedly.

In 40 Cyc. 1490, it is said, "Where the subject of a testamentary disposition is directed to be 'equally divided' or to be divided 'share and share alike' or where similar words are used which indicate an equal division among a class of persons, the persons among whom the division is to be made take *per capita*, unless a contrary intention is discoverable from the will." Where the gift is to classes as such, words

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denoting equality of division may apply to the respective classes without regard to the number of persons in each class. See 40 Cyc. 1491. The phrase "share and share alike" ordinarily imports an equal division in severalty. *Daggett v. Slack*, 8 Met. 450, 454; *Shattuck v. Wall*, 174 Mass. 167, 169; *Bishop v. McClelland*, 44 N. J. E. 450, 453; *Bisson v. W. S. R. R. Co.*, 143 N. Y. 125, 129. In the will in hand the testator used the phrase in that sense in the fifth paragraph which related to the division of certain insurance money, and he used it in the same sense in clause C of the sixth paragraph. He used the phrase again in clause G, but a question as to the construction of that clause may arise upon the termination of the trust and we do not feel called upon to pass upon that now. Where property is devised to children and grandchildren it has been held that the division among them is to be *per capita* even though the beneficiaries are not named individually, unless a contrary intent appears in the will. *Farmer v. Kimball*, 46 N. H. 435; *Kimbrow v. Johnston*, 15 Lea 78; *Perdue v. Starkey*, 86 S. E. (Va.) 158; *Kling v. Schnellbecker*, 107 Ia. 636; *Brittain v. Carson*, 46 Md. 186. In the case at bar the children of the son Charles are named individually, and there is abundant authority to the effect that where such is the case and words denoting equality of division are used the beneficiaries take *per capita*. *Hardy v. Roach*, 190 Mass. 223; *Wells v. Newton*, 67 Ky. 158; *Crawford v. Redus*, 54 Miss. 700; *Marsh v. Dellinger*, 127 N. C. 360; *Kean's Lessee v. Hoffecker*, 29 Am. Dec. (Del.) 336. The language of clause B is as clear as, if not clearer than, that used in clause A. It is not ambiguous. It does not conflict with any other provision. Nor is it opposed to any clear general intent manifested in the will taken in its entirety. We hold, therefore, that the beneficiaries named in clauses C, D, E and F take the income in question, i. e., the share payable under clause B, in equal shares *per capita*.

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As above stated, the testator's widow declined the testamentary provision and elected to take her dower, and the trustees have therefore distributed the income in shares of one-fifth each. This we hold was proper. Under clause A the widow's share of the income, had she taken it, would, upon her death, have gone to the other beneficiaries to be divided in accordance with the proportions of the income given to them respectively by the other clauses of the will. The amount of the income distributable under the will was decreased through and by the widow's election. The will contains no provision covering the contingency, but upon the doctrines of compensation and acceleration the beneficiaries, other than the widow, became entitled to receive the entire income of the residuary estate remaining. "When the rejection by a widow of the provisions made for her by her deceased husband's will results in the diminution or contravention of devises and legacies to other persons, the renounced devises and legacies given by the will to the widow should be used to compensate, so far as may be, those whom her election disappoints." 11 A. & E. Enc. Law (2nd ed.) 117. "As a general rule, when the widow has dissented from the will of her husband, by which certain property was given to her for her life, with a limitation over to other persons, those persons to whom the property was limited over by way of remainder are entitled to the immediate enjoyment of so much of such property as remains after satisfying the claims of the widow; for by such acceleration of enjoyment the remaindermen are, in part at least, compensated for the diminution of their devises or legacies." Id. 118, 119. See *Hall v. Smith*, 61 N. H. 144; *Shreve v. Shreve*, 176 Mass. 456; *Beideman v. Sparks*, 61 N. J. E. 226; *Randall v. Randall*, 37 Atl. (Md.) 209.

Judgment may be entered herein in accordance with the views above expressed.

Syllabus.

R. B. Anderson (*Frear, Prosser, Anderson & Marx* on the brief) for the trustees.

A. A. Wilder (*Stanley & Wilder* on the brief) for Emma Danford.

J. W. Cathcart (*Thompson, Milverton & Cathcart* on the brief) for Maria Notley Hughes, David F. Notley and Patrick Gleason, Trustee.

A. Lindsay, Jr. (*Lindsay & Lymer* on the brief) for the administrators of the estates of Mary K. Notley, deceased, and Melisa Notley, deceased.

J. T. DeBolt for the children of Charles Notley, Jr. other than William.

William Notley submitted to the judgment of the court.

HEE FAT *v.* WONG KWAI, CHING SHAI, CHING CHU, HEE CHO AND CHOY KNOG.

No. 901.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED MAY 8, 1916.

DECIDED JUNE 5, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

BILLS AND NOTES—*statute of limitations*—*motion for nonsuit*.

In an action on a promissory note where evidence is received on behalf of plaintiff tending to prove a payment which would prevent the running of the statute of limitations, such evidence not being objected to on any proper ground, a motion for a nonsuit on the ground that the claim is barred by the statute of

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limitations, is properly denied although such payment has not been pleaded.

WITNESSES—*proof of handwriting.*

A witness who is called on to prove handwriting merely by comparison of hands must be shown to be an expert and it is error to permit one who has not qualified as such to testify as an expert.

PARTNERSHIP—*nontrading—power of members to execute notes.*

In order to hold a nontrading partnership upon a note given in the firm name by one partner it must be shown as a question of fact that authority to execute the note existed, or that the act has been ratified (*Lea Bow v. Young Yung*, 11 Haw. 772).

OPINION OF THE COURT BY WATSON, J.

This is an action on a promissory note. There was a verdict of the jury in favor of the defendants and the plaintiff brings the case to this court by writ of error. Plaintiff's complaint in substance alleges that on the 5th day of January, A. D. 1903, the defendants, then being partners under the firm name of Lan Hing Wai Co., for value received, made, executed and delivered under said firm name to Hee Fat (plaintiff in error herein) a certain promissory note in writing of that date, by which said defendants (defendants in error here) promised to pay to the order of the said plaintiff the sum of \$6000 in annual instalments of \$1000 each, as provided in said note, a copy of which was annexed to plaintiff's complaint. (The note is signed "Lan Hing Wai Company, by Wong Kwai, Manager.") The complaint further alleges that the said note is due and wholly unpaid, and that defendants, although payment thereof has been demanded of them, have wholly failed to pay said note or any part thereof or any interest thereon except the sum of \$300 paid as interest on the 6th day of August, 1903, and \$200 paid as interest on the 13th day of January, 1904. Plaintiff prays for judgment against the defendants in the sum of \$6000 together with costs, interest and attorney's commissions. To this complaint two of the defendants,

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Ching Shai and Hee Cho, filed their answer of the general issue and demanded a jury trial. Thereafter said defendants' answer was amended by adding thereto the notice that the defendants relied on the defense of the statute of limitations. Upon the trial of said action the jury rendered a verdict in favor of the defendants upon which judgment was thereafter duly entered.

An inspection of the transcript of the testimony discloses that the controverted facts in this case are (1) the existence of the partnership; (2) the consideration or lack of consideration for the giving of the note, and (3) Wong Kwai's authority to execute the note. The determination of these issues was submitted to the jury upon a mass of conflicting evidence, and their verdict precludes inquiry into the relative weight thereof. The judgment on this verdict must therefore stand unless a material error can be shown in some ruling of the court made during the progress of the trial and duly excepted to.

Before taking up the assignments of error it may be well to notice the contention of counsel for defendants in error that their motion for a nonsuit should have been granted in the court below. The principal ground of this motion, and the one relied on in this court, is that plaintiff in error's claim was barred by the statute of limitations. Assuming, without deciding, that the mere giving of notice by defendants in their amended answer that they intended to rely upon the statute of limitations as a defense was a sufficient pleading of the statute under rule 4 of the circuit court of the first judicial circuit to enable them to urge the bar of the statute by a motion for a nonsuit (see *Kapela v. Gilliland*, 22 Haw. 655); we are of the opinion that the motion was properly denied. It appeared from the plaintiff's evidence, to which no proper objection was made, although not pleaded, that the sum of \$100 was paid on account of the note on the 8th of February, 1909, and even

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under the theory of counsel for defendants in error, that plaintiff's cause of action accrued on January 5, 1904, when default was made in the payment of the first instalment due, this payment was sufficient to take the claim out of the statute of limitations. *Warren v. Nahea*, 19 Haw. 382. The complaint herein was filed on September 20, 1912.

Certain of the assignments of error go to the action of the court in permitting Tom Ayoy and Hee Kwock, witnesses for the defendants, to testify as experts as to handwriting by comparison, without first qualifying as experts, as appears by assignments Nos. 7 and 9. The Chinese writings concerning which these witnesses testified were contained in a book (plaintiff's exhibit E). This book had been identified and introduced in evidence as one of the account books of the Lan Hing Wai Company, in which was shown the account between said company and Hee Fat. The book contained entries showing that Hee Fat had from time to time advanced moneys to said company amounting to \$6166.31, and that the note sued on was given to cover this indebtedness. Wong Tai Look, one of the witnesses called by plaintiff, testified that this book (plaintiff's exhibit E) was all in the handwriting of the bookkeeper of the Lan Hing Wai Company, with the exception of one entry that was made by himself (the witness), the bookkeeper (Chun Kiang Hom) being dead at the time of the trial. The items contained in this account aggregating over \$6100, for moneys claimed to have been advanced to the Lan Hing Wai Company by plaintiff, according to the testimony of the witness Wong Tai Look, constituted the consideration for the giving of the note sued on. The witness Tom Ayoy testified that he had been employed as a clerk in a trust company for about nine years; that he was more or less experienced in reading and writing the Chinese language; that he sometimes read Chinese letters, Chinese newspapers and books; that he received letters from friends and rela-

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tives, sometimes once a month and sometimes he got a lot; that he did not think he was efficient in distinguishing between writings of different persons because he had dropped the writing of the Chinese language for the past two or three years; that he thought he could distinguish Chinese handwritings. The witness Hee Kwock testified that he had been engaged in the butcher business for four or five years; that he knew how to read and write Chinese; that he used Chinese writing and reading in his business; that during the years from 1905 to 1912 he had worked for Hee Fat and that he used Chinese characters in keeping books and taking care of his business; that he could look at Chinese manuscripts and tell whether they were written by the same or different persons. Having testified as above the witnesses Tom Ayoy and Hee Kwock were permitted by the court, over the objection of the plaintiff, to testify as experts in the comparison of handwriting and to state their opinions that certain pages in the book (plaintiff's exhibit E) were not in the same handwriting as the rest of the book, in other words, that certain of the pages were not in the handwriting of Chun Kiang Hom, the bookkeeper. The book itself is not before us, not having been sent up as part of the record in the case, and, perhaps, if it were, being in the Chinese language, it would be of but little assistance to the court. But undoubtedly the evidence of these two witnesses, who were permitted to testify as experts, if believed by the jury, would tend to cast suspicion upon the genuineness of the entries contained in the book, including those showing the account between the plaintiff and the Lan Hing Wai Company. We are of the opinion that the evidence in this case, in relation to the competency of the witnesses Ayoy and Hee Kwock to testify as experts in the comparison of handwriting, was not sufficient to qualify either of such witnesses as an expert, and we think the court erred in permitting them to so testify. Under our system

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of pleading (Sec. 2369 R. L. 1915) the defendants were at liberty to show an original want of consideration under their answer of the general issue (14 Pl. & Prac. 628), and we think it fair to conclude that the verdict of the jury was influenced by the evidence above referred to to the prejudice of the plaintiff. Neither of the witnesses was acquainted with the handwriting of the bookkeeper Chun Kiang Hom, which would have made him competent to give his opinion of the genuineness of the disputed writings. In *Strother v. Lucas*, 6 Pet. 763, the court lays it down as a general rule that "evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands." This rule, which is the rule of the common law (17 Cyc. 163) was followed in *Rogers v. Ritter*, 12 Wall. 317, 322, 20 L. ed. 417, and is generally recognized as the rule prevailing in the Federal Courts. 17 Cyc. 168; Lawson Exp. and Op. Evidence, p. 432. Even in those jurisdictions where, as in this Territory (Sec. 2623 R. L. 1915), such testimony is admissible by statute, the witness called on to testify merely from a comparison of hands must be shown to be an expert (17 Cyc. 176; *Williams v. Conger*, 125 U. S. 397, 413), and it is error to permit one who is not qualified as such to testify as an expert. *Heacock v. The State*, 13 Tex. App. 97. In the case at bar it is obvious from what has been stated that neither of the witnesses offered to prove the handwriting by comparison was an expert. In *The State v. Tompkins*, 71 Mo. 614, the court said, "One who does not profess to be an expert in handwriting and whose vocation in life has not been such as to qualify him to judge of handwritings, should not be permitted to testify as an expert."

There are a number of other assignments of error, but as they are of a nature not likely to arise upon another trial we shall only notice that one (assignment No. 48) predi-

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cated upon the giving of defendants' requested instruction No. 14, relating to the power of a partner in a nontrading partnership to execute a note in the name of the firm. On this point the court instructed the jury:

"One partner in a nontrading partnership cannot bind his partner by a note, unless he has express authority to execute it, or the execution is necessary to the transaction of the partnership business, or there be proof of some custom in that class of trading from which the law implies the authority. The burden to prove what is essential to give rise to the liability rests on the party who brings the suit."

Defendants in error cite Lindley on Partnership (4th ed.) p. 267, and *Deardorff v. Thacher*, 78 Mo. 128, as sustaining the correctness of the law thus laid down. According to plaintiff's evidence, defendants, at the time of the execution of the note, were copartners engaged in conducting business as rice planters. We think the instruction as given is substantially correct, although, perhaps, technically defective in not pointing out more clearly that there might be an implied authority to execute the note or a ratification of the act by the other partners. The law on this subject is very clearly laid down in a case decided by this court (*Lea Bow v. Young Yung*, 11 Haw. 772) where the court said:

"In order to hold such a firm (a nontrading partnership) upon a note given in its name by one partner it must be shown as a question of fact that such authority existed or that the act has been ratified. In such case there may be shown express authority or authority implied from its necessity to the successful conduct of the business or from the usage of similar firms or the usage of the particular firm."

In the syllabus the law is stated as follows:

"In trading and commercial partnerships there is a general presumption that one partner has authority to give notes in the name of the partnership. In other partnerships the presumption is generally the other way, but this presumption may be rebutted by proof of authority, express or implied."

Syllabus.

For the error pointed out the judgment must be reversed and the cause remanded, and it is so ordered.

J. Lightfoot for plaintiff in error.

E. C. Peters for defendants in error.

IN THE MATTER OF THE ESTATE OF JOHN ENA,
DECEASED.

No. 950.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

SUBMITTED MAY 29, 1916.

DECIDED JUNE 10, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

~~TRUSTS—costs—trustees' commissions—principal—income.~~

Under R. L. 1915, Sec. 2542, the commissions of trustees which are chargeable on principal should be paid out of the principal and those chargeable on income should be paid out of the income.

OPINION OF THE COURT BY ROBERTSON, C.J.

The circuit judge reserved for the consideration of this court the question whether "commissions chargeable under lines 51 to 58 inclusive of section 2542 of the Revised Laws of 1915 are chargeable only against the corpus of the estate or may they be charged against the income"? A question so framed might well be returned unanswered since it presents a mere abstract query. It appears from the record that the trustees of the estate of the late John Ena sold certain shares of stock for the sum of \$1399.01. They received also the sum of \$341.60 on certain shares of a dissolved corpora-

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tion. Those shares respectively formed part of the trust estate at its inception. The trustees used this money, or, to be exact, the sum of \$1736.98, for the purpose of securing a registered title to a piece of land and for making certain permanent improvements thereon. The trustees charged commissions of $2\frac{1}{2}\%$ on the sum so received, and at a like rate upon the sum so expended. It appears that there is no cash in the principal account and unless these commissions may be paid out of the income of the estate it will be necessary to convert some of the *corpus* into money in order to pay them. The circuit judge ruled that they should be paid out of the income, and the question intended to be reserved upon motion under section 2512 of the Revised Laws was whether the ruling was right.

The finding of the circuit judge that the commissions were due to the trustees forecloses a possible question as to whether the money expended was a "final payment" within the meaning of the statute, and the further possible question as to whether by expending the money without first deducting the commission the trustees waived their right to demand it. The single question now is whether the commissions so charged by the trustees and allowed by the circuit judge are properly chargeable against the income or the principal. The statute which is followed with reference to the compensation of trustees is that which fixes the commissions of executors, administrators and guardians. (R. L. 1915, Sec. 2542.) It provides as follows:

"Upon all moneys received representing the estate at the time of the institution of the trust, such as cash in hand and moneys realized from securities, investments, and from sales of real estate and personal property other than interest, rents, dividends and other profits coming due after the inception of the trust, two and one-half per centum.

"Upon the final payment thereof or any part thereof, two and one-half per centum; provided, however, that no com-

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mission shall be allowed as for final payments of such moneys except upon amounts actually expended and upon balances paid into court or to the parties thereunto entitled, upon the final settlement of the services for which such executors, administrators or guardians shall have been appointed and qualified.

“Upon all moneys received in the nature of revenue or income of the estate, such as rents, interest and general profits, ten per centum for the first thousand dollars, seven per centum for the next four thousand dollars, and five per centum for all amounts over and above the first five thousand dollars.”

We think the natural meaning and evident intent of these several provisions is that the commissions chargeable on principal should be paid out of the principal and those chargeable on income should be paid out of the income. To hold otherwise it may easily be imagined, might result in great inconvenience and hardship in estates where the income and principal are payable to different persons. The statute prescribes a uniform rule for all trust estates. We hold, therefore, that the commissions in question, assuming they were correctly allowed, would properly be charged to and paid out of the principal of the estate.

Frear, Prosser, Anderson & Marx for the trustees.

Henry Smith for Thomas F. Ena.

Syllabus.

WALTER W. SCOTT, A MINOR, JANET M. SCOTT, A MINOR, RUBENA F. SCOTT, A MINOR, AND THE BISHOP TRUST COMPANY, LIMITED, A CORPORATION, GUARDIAN OF THE ESTATE OF SAID WALTER W. SCOTT, JANET M. SCOTT AND RUBENA F. SCOTT, MINORS, *v.* MARY N. LUCAS.

No. 927.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED APRIL 13, 1916.

DECIDED JUNE 13, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

WILLS—vested remainder—defeasance—condition impossible of performance.

Where by a last will and testament a remainder in fee is vested in a devisee subject to defeasance by a condition subsequent and prior to the performance of the condition such condition becomes impossible of performance, the vested remainder becomes absolute in the devisee and no longer subject to the defeasance provided for in the will.

OPINION OF THE JUSTICES BY QUARLES, J.

(Robertson, C. J., dissenting.)

This is a controversy submitted upon agreed facts to obtain a decree quieting title to an undivided one-ninth interest in and to certain lands described in the submission of facts. The plaintiffs, Walter W. Scott, Janet M. Scott and Rubena F. Scott, minor children of Catherine Haunani Scott (nee Bertelmann), appear by their guardian as plaintiffs, and Mary N. Lucas, who claims the said undivided interest, appears as defendant. The settlement of this controversy depends upon the construction of certain provisions in the last will and testament of Christian Henry Bertelmann, upon which the merits of the controversy must

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be decided. This will has heretofore been before this court for construction and the provisions here involved construed (*Bertelmann v. Kahilina*, 14 Haw. 378), where it was held that each of the six daughters of the testator, under the first and fourth items of the will, took vested remainders in fee subject to defeasance upon payment to each of them of the sum of \$5000 by the three sons, or one or more of them, of the testator, as provided in the third item of the will. That item reads:

"At the expiration of the 25 years lease with the Kilauea Sugar Co. it is my sincere wish and *will* that my lands shall befall in equal shares and interest upon my three sons *Frank Charles, Henry Godfrey* and *Christian Sylvester Bertelmann* or then surviving sons or son. Provided however that at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of *five thousand dollars* \$5000.00. In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the \$5000.00 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:

"1. To each of my daughters or surviving daughters the amount aforesaid of \$5000.00.

"2. To my shortcoming son or sons the same amount of \$5000.00 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above mentioned conditions.

"3. To my wife Susan Bertelmann a life rent of \$2000.00 per annum. I make the payment of all these amounts above given a charge upon all my estate."

The defendant has purchased all of the interest of the three sons and of all of the daughters except the late mother of the plaintiffs, she having died September 10, 1915, leaving the plaintiffs as her surviving chil-

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dren. The lease mentioned in the will has expired, and the one year in which the sons, or one or more of them, may purchase or acquire the interest of their sisters under the third item of the will, hereinabove quoted, is now running. It is contended on behalf of the defendant that Mrs. Scott, mother of the plaintiffs, having died prior to the expiration of the lease, the plaintiffs have no interest in the lands in question, and that the provision as to payment of \$5000 to each of the daughters does not apply to the interest which Mrs. Scott would have if she had survived the expiration of the lease; and, that the defendant takes the whole freed from the charge of said \$5000. In furtherance of this contention it is earnestly insisted on the part of the defendant that the former decision to the effect that Mrs. Scott and the other daughters took vested remainders in fee is incorrect and that their interests, respectively, are, and were, contingent upon their survival of the expiration of the lease, and upon the failure of the sons, or one or more of them, to pay to the daughters the \$5000 each. These contentions were, we think, correctly disposed of in the former decision of this court, for the reasons therein stated. The mother of the plaintiffs took a vested remainder in fee, subject to be defeated by the payment to her by the sons, or one or more of them, of the sum of \$5000 within one year after the expiration of the lease. We do not feel at liberty to disturb that decision which has been acted upon for nearly fourteen years, and which has become an established rule of property so far as the rights here involved are concerned. The former decision, which simplifies and narrows the questions to be here decided, correctly holds that the acquisition of the interests of the daughters under the will by the sons, or one or more of them, was a mere privilege which depended upon a condition precedent—the payment of the prescribed sums—while the defeasance of the vested remain-

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der in the daughters depended upon a condition subsequent—the payment to each daughter of the sum of \$5000 at the time and in the manner prescribed in the will. The difference between a condition precedent and a condition subsequent is well described in *Winthrop v. McKim*, 51 How. Prac. 323, where the court at page 327 says:

“Conditions precedent are such as must happen or be performed before the estate can vest.

“Conditions subsequent are such as when they happen or are performed, or are not performed, as the case may be, divest, curtail or abridge an estate already vested.

“It is also a well settled rule that, where an estate is to arise upon a condition precedent, if the condition becomes impossible no estate or interest grows thereupon.

“Upon the other hand, if the performance of a condition subsequent becomes impossible, the condition is void, and the estate vests as though no such condition had been imposed.”

These rules are supported by practically all authority, English and American, from the time of Sir William Blackstone to the present. Blackstone (Book 2, 154, 156) says:

“An estate on condition expressed in the grant itself, is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. These conditions are, therefore, either *precedent* or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. * * * These express conditions, if they be *impossible* at the time of their creation, or afterward become impossible by the act of God or of the feoffer himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void.” See 2 Jarman, Wills, 5th ed., pp. 10, 11.

It is well settled that a condition precedent to the vesting of an estate must be strictly construed and fully per-

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formed (*Nevius v. Gourley*, 95 Ill. 206, 213; *Martin v. Ballou*, 13 Barb. 119, 132; 4 Kent's Com. (13 ed.) 135, and authorities cited in note c).

It is also well settled that the performance of a condition subsequent whereby a vested estate is divested must be strictly construed and fully and literally performed else the vested estate remains absolute. The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease, rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of \$5000, a privilege granted to the sons, or one or more of them, by the testator. That condition becoming impossible by the act of God is as though it was never made. The plaintiffs inherited from their mother the estate bequeathed to her by the will and vested in her as decided by the former decision of this court. That vested estate could only be defeated by a strict and literal performance of the condition prescribed (1 Jarman, Wills, 5th ed., 827; 2 Jarman, Wills, 5th ed., 11, 13; Roper on Legacies 618, 766, 767, 783; *Ridgway v. Woodhouse*, 7 Beav. 437, 49 Eng. Reprint 1134; *Ill. Land & Loan Co. v. Bonner*, 75 Ill. 315, 327; *McFarland v. McFarland*, 177 Ill. 208, 217). Conditions subsequent are not favored in law (*Davis v. Gray*, 16 Wall. 203, 230), and are "construed beneficially in order to save, if possible, the vested estate or interest; and if such condition prove illegal, or incapable of performance, whether as against good morals or as impossible under any circumstances, or is rendered impossible in a particular case and under existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect" (*Harrison v. Harrison*, 31 S. E. 455, 458).

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We have examined a large number of decisions, both English and American, and find them all in harmony with the rules herein announced. It follows that the plaintiffs inherited from their mother the estate in the lands in controversy vested in her by the will of her father, freed from the condition subsequent whereby the same could be divested if their mother was now living. Under the conclusion at which we have arrived the sons, or either of them, cannot now defeat the estate which vested in the mother of the plaintiffs in her lifetime by reason of the provisions of the said will, which descended to and vested in the plaintiffs.

The agreed statement of facts is silent as to whether either of the sons is prepared to and desires to purchase the interest of the plaintiffs in the lands in question. Neither of the sons of the testator is a party to this submission. The defendant claims, in the event that it is held that the vested remainder which the mother of plaintiffs took under the will was not defeated by her death prior to the expiration of the lease, the right to defeat the interests of the plaintiffs by payment to them of the sum of \$5000, by virtue of her having purchased the interest of each of the testator's sons. This contention fails under the conclusion reached. If the death of Mrs. Scott, mother of the plaintiffs, prior to the expiration of the lease did not make the condition subsequent by which the remainder vested in her by the will could be defeated impossible of performance, as we hold it did, then it would be necessary to decide whether or not the privilege given the sons, or one or more of them, under the third paragraph of the will, to purchase the estate in remainder which vested in the daughters at the death of the testator, passed to the defendant by reason of the deeds from the sons to her. This would involve the consideration of the question as to whether the privilege given the sons, or one or more of them, of buying out the daugh-

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ters was a mere personal privilege to be performed by the sons only. A study of the will shows clearly a manifest intent on the part of the testator that his three sons and six daughters should share equally; that the sons, at the expiration of the lease, jointly should have the right of buying out the interests of the daughters if all of the sons were prepared to and desirous of so doing; but, if one or two of the sons should not be so prepared, and so desire, the son or sons so prepared and desirous should have that right. It was a mere privilege accorded to the sons, or one or more of them, if their desires and ability to purchase should permit, of acquiring all the leased lands. The privilege granted seems personal, and no intention can be found in the will that the daughters should be obliged to sell their respective interests in the lands in question at the stated price of \$5000 to any one other than the sons, or one or more of them. The condition upon which the remainder which vested in Mrs. Scott, mother of the plaintiffs, could be defeated having become impossible of performance by reason of her death, thus terminating the privilege granted the sons of buying her interest, and defeating the remainder which vested in her, it is unnecessary to determine whether or not that privilege could be exercised by an assignee of the sons.

A judgment may be prepared decreeing that the defendant has no right, title or interest in or to the undivided one-ninth interest in and to the lands described in the agreed statement of facts claimed by the plaintiffs as heirs of Catherine Haunani Scott, vested in the said plaintiffs in fee, and adjudging the plaintiffs to be the absolute owners in fee of said undivided one-ninth interest in and to the said lands, and it is so ordered.

E. A. Mott-Smith for plaintiffs.

A. Perry for defendant.

Robertson, C. J., dissenting.

DISSENTING OPINION OF ROBERTSON, C.J.

The material portions of the will of the late Mr. Bertelmann are set forth in the former opinion of this court reported in 14 Haw. 378, 385, 386.

The clearly expressed intention of the testator was that the sons should have the right to acquire the whole of the leased land upon giving to the daughters what the testator evidently considered a fair equivalent for the interests devised to them. It was his will "that my lands shall befall in equal shares and interest upon my three sons;" that they "will have a right to buy the whole of my lands now leased to the K. S. Co.;" and that "by doing so, they my sons or he my son will enter in full possession of all my lands, and their or his right and title will be undisputable" etc. Thus did the testator express a dominating intent. It being a lawful intent it is the duty of this court to see that it is carried out. Strictly speaking, I think, the estate given each of the daughters was not an estate upon condition subsequent, but a limitation. The condition precedent to be performed by the sons is that they should pay "to each one of my daughters or surviving daughters the sum of five thousand dollars." The third paragraph of the will, taken by itself, supports the view that the remainders of the daughters after the expiration of the lease would be defeated by death during the term of the lease. Upon a strict literal interpretation of that paragraph it would have to be held that the sons could acquire title to the whole land by paying \$5000 to each of such daughters as might be living when the time came for the sons to exercise the right given them, i. e., between the date of the expiration of the lease and one year thereafter. Such literal interpretation is not followed, however, because it is not in harmony with the general intent of the testator as shown by the will as a whole, as held by this court in the former

Robertson, C. J., dissenting.

case, that the daughters were intended to have vested estates in fee. That is, estates which would descend to their respective heirs. But this departure from the language used in the third paragraph, which is required by the entire context, should not be carried to such an extent as to defeat the primary and clearly expressed intent of the testator that his sons should have the right to acquire the whole land by paying for the interests given to the daughters and their heirs. The contingency of the death of a daughter before the expiration of the lease was not provided for. Yet in order to effectuate the intent manifested by the testator it must be held that as to the estate of a deceased daughter which has passed to her heirs the sons should have the right to pay those heirs the sum which the will stated should have been paid to that daughter had she lived. The primary intent of the testator having been ascertained from the will as a whole the language used in any particular paragraph must, if inconsistent with that intent, be made to bend to it. "In case of doubt a will should be construed in favor of a general or primary intention rather than a particular or secondary one; and where in such a case a particular intention, or particular terms, as expressed in some part of the will, are inconsistent with and repugnant to the testator's general intention as ascertained from all the provisions of the will, the general intention must prevail." 40 Cyc. 1393. The general rule, which, it is conceded is well settled, that a condition precedent must be literally performed, should not be enforced in the case of a will when the intent of the testator would thereby be defeated. The general and primary intent was that the sons, or one or more of them, should have the whole land; the language used with reference to the condition upon which they should acquire it was the expression of a secondary and particular intent. The means was secondary to the end, and should yield or conform to it. To hold otherwise, it seems to me, is to sac-

Syllabus.

rifice the substance to the shadow upon a narrow and technical view. This is not a case where the literal performance of a condition has become impossible. The condition precedent prescribed in the third paragraph of the will could be literally performed, and, as the agreed facts show, has been performed, notwithstanding the death of one of the daughters, by making the payments to the surviving daughters. Properly construed, however, the condition precedent which the testator imposed to the acquisition by the sons of the estates given to the daughters was not that they should make payment to the surviving daughters only, but that they should pay the sum named for the interest given to each of the daughters and their heirs. The right to acquire the interests of the daughters was not, I think, a mere personal privilege which could not be assigned to and exercised by a vendee of the sons. In my opinion the judgment should be that the plaintiffs are seised in fee of an undivided one-ninth of the land subject to the right of the defendant to acquire the same by the payment of \$5000.

TERRITORY v. GUS ANDERSON.

No. 933.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JUNE 5, 1916.

DECIDED JUNE 14, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CRIMINAL LAW—*arrest of judgment—errors available.*

On a motion in arrest of judgment errors appearing on the record are available; but an objection that the verdict was contrary to the evidence may not be urged in arrest of judgment.

Opinion of the Court.

Per Curiam: The defendant was indicted for the crime of assault with intent to commit rape, and was convicted of that of indecent assault. He filed a motion in arrest of judgment on the ground: "That during the trial of said cause and as a part of the prosecution's case, it proved that said defendant said Gus Anderson had been an insane person for a period of three years prior to June 13th 1913 and further that said Gus Anderson was an insane person on the said 13th day of June 1913, and said prosecution failed and wholly neglected to prove or show that said defendant had at any time subsequent to said 13th day of June 1913 regained a normal mental condition or that he said defendant was a normal sane man on or about the 23rd day of January 1916 the date upon which defendant is alleged to have committed the crime of 'assault with intent to commit rape' as charged in the indictment herein."

The record shows that the question of the defendant's sanity was left to the jury as one of fact upon instructions given them by the court. If, therefore, the verdict was wrong it was because it was against the evidence. The point, even if well taken, was not available to the defendant on a motion in arrest of judgment, though it would have been good as a ground for a new trial. "A motion in arrest of judgment differs from a motion for a new trial, in that the former can be based only upon facts appearing in the record, or upon some matter which ought to appear there but does not appear. The motion in arrest reaches substantial errors which are patent on the record, and which vitiate the proceedings, and not errors on the trial not in the record and which can only appear by a bill of exceptions." 12 Cyc. 756. "The objection that the verdict is contrary to the evidence or based on insufficient evidence, or that it is contrary to the instructions, cannot be urged in arrest of judgment. The remedy of defendant is to move for a new trial." Id. 759.

Syllabus.

The circuit court reserved the question whether it should sustain the defendant's motion to arrest the judgment. We are obliged to hold, without passing on the merits of the contention that the verdict was against the evidence, that the motion ought not to be granted.

The reserved question is answered in the negative.

W. T. Carden, Second Deputy City and County Attorney, for the Territory.

Frank Andrade for defendant.

NETTIE L. SCOTT v. ESTHER N. PILIPO AND
ELIZABETH K. PILIPO.

No. 919.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED MAY 24, 1916.

DECIDED JUNE 15, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

HUI—*lease of interest in hui land.*

A lessee of an interest in hui land takes title subject to such valid regulations as have been duly adopted by the hui.

COVENANTS—*breach of covenant for quiet enjoyment—pleading.*

In an action for damages for the breach of a covenant for quiet enjoyment the plaintiff must show that he has been prevented from taking possession of the demised premises or has been evicted therefrom by the lessor himself, or by a person claiming under him, or by one having a superior title.

PLEADING—*amendment on appeal.*

An amendment to a pleading will not be allowed in the supreme

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court on appeal when it would change the issue and cause the reversal of a judgment which was free from error at the time it was entered.

LIMITATION OF ACTIONS—covenant for quiet enjoyment.

Where, at the commencement of a term, the lessee is unable to obtain possession of the demised premises through the fault of the lessor the covenant for quiet enjoyment is then broken and the statute of limitations begins to run at once.

OPINION OF THE COURT BY ROBERTSON, C. J.

The plaintiff brings to this court an exception to an order sustaining a demurrer to a complaint in an action of covenant. The case arises under a lease made between the defendants, as lessors, and the plaintiff, as lessee, of an undivided interest in the land of Holualoa, North Kona, Hawaii, for the term of thirty years from September 1, 1894. This lease has furnished the subject of much litigation. See *Pilipo v. Scott*, ante p. 26. The lease contains a covenant on the part of the lessors that "if the said rent shall be duly paid and the covenants and conditions herein shall be duly observed, then in such case the said lessee, together with his executors, administrators and assigns, may have, hold and possess the demised premises without hindrance of any person whomsoever, but it being understood that this demise is of undivided interests." The plaintiff, in her complaint alleges, in substance, that upon the execution of the lease (August 21, 1894) she paid the rent for a year in advance; that on September 1, 1894, she essayed to enter upon the premises, but was hindered and prevented by others, without fault on her part, from securing possession; that though the lessee has many times requested possession she has at all times been prevented from any possession, use or enjoyment of the demised premises; that the lessee, nevertheless, paid the rent until September 1, 1899, at which time she informed the lessors that she

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would pay no more rent until possession of the premises should be secured to her; that since then the lessors have obtained several judgments against the lessee for rent, one of which has been satisfied; and that the amount of said judgments, including certain costs, and the five years' rent voluntarily paid, is \$6895.38. The prayer is for judgment for said sum with interest.

It does not clearly appear by the record upon what ground or grounds the court below sustained the demurrer, but the grounds relied on in this court are that as to the amounts for which judgments for rent have been obtained by the lessors against the lessee, the latter had opportunity to present all defenses thereto in the actions wherein the judgments were rendered; that it does not appear but what the persons, described in the complaint as "others," who prevented the lessee from obtaining possession of the demised premises were strangers and trespassers; and that the cause of action, if any, accrued on September 1, 1894, and the right to sue upon it is barred by the statute of limitations.

There is considerable discussion in the appellant's brief on the point whether the liability of the lessors upon their covenant may be affected by a covenant, contained in the lease, upon the part of the lessee that "in entering upon the land 'makai' of the upper government road" she will not "enter or interfere with the parcels of said land now occupied by members of the hui (Hoa Aina) whether as house-lots or agricultural purposes in places heretofore planted by them," and we infer that this point entered into the ruling made by the circuit court. It does not appear from the plaintiff's complaint that this covenant of the lessee has any bearing upon the matter, and we see no need of discussing the question. It is said in appellant's brief that it appears indirectly by the lease (a copy of which is made part of the complaint) that the lessor's title was defective, and it is contended that by the covenant for quiet enjoy-

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ment the lessors assumed the consequences of the defect. In what such defect consisted has not been explained. If it is meant that it indirectly appears that a part of the land was held in severalty by members of the hui (see *Pilipo v. Scott*, 21 Haw. 609) it may be replied that while the members of a Hawaiian land hui hold the property as tenants in common the adoption of regulations concerning the management of the hui and the use of the land constitutes them a voluntary association, and persons entering into membership through the acquisition of shares—so-called—in the land take their interests therein subject to such valid regulations as may have been duly adopted by the hui with reference to the holding of portions of the land in severalty. See *Burrows v. Paaluhi*, 4 Haw. 464; *Mahoe v. Puka*, *id.* 485; *Foster v. Kaneohe Ranch Co.*, 12 Haw. 363; *Scott v. Pilipo*, 22 Haw. 174, 180. In *Burrows v. Paaluhi*, it was held that a regulation that members of the hui should not lease their interests without the consent of the luna was binding upon a non-member who took a lease with notice of the regulation. But, having acquired membership, one would be charged with notice of the duly adopted regulations of the hui relating to its internal management. The right to demand the partition of the premises is always available to a member who is dissatisfied with the regulations or management of the hui. There is nothing in all this, however, that shows that the lessors' title was defective.

The first point urged in support of the demurrer, which was intended to present the question of *res judicata*, cannot be considered upon its merits since the complaint does not show upon its face what the pleadings or issues were in the actions referred to. Neither the complaint nor the demurrer can be eked out or supplemented, through judicial notice or otherwise, by reference to the opinions of this court in

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the previous cases between these parties as counsel apparently expected might be done.

As to the alleged breach of covenant. In order to sustain an action for the breach of a covenant for quiet enjoyment it is necessary for the plaintiff to show that he has been prevented from taking possession of the demised premises or has been evicted therefrom by the lessor himself, or by a person claiming under him, or by one having a superior title. 11 Cyc. 1118, *et seq.*; 24 id. 1058; 18 A. & E. Enc. Law (2nd ed.) 625. The inability of the lessee to obtain possession of the premises as a tenant in common with the other shareholders in the Hui of Holualoa constituted a breach of the covenant for quiet enjoyment if such inability was due to the acts of the lessors, or of persons claiming the right of possession by, through or under them; but not if they were those of other shareholders in the hui acting in their own right and not in denial of the title of the lessors, nor if they were strangers or mere trespassers. Therefore, the allegation that the lessee "was hindered and prevented through no fault of lessee *by others* from securing any possession" etc., does not show a breach of the covenant in question. The circuit court might properly have sustained the demurrer on this ground. See *Grannis v. Clark*, 8 Cow. 36; *Andrus v. St. Louis Smelting Co.*, 130 U. S. 643, 648. The appellant asked leave in this court to amend her complaint by alleging that the lessee was hindered and prevented from securing possession "by others with superior rights derived from the lessors." Section 2371 of the Revised Laws permits the amendment of pleadings on appeal after judgment "in furtherance of justice * * * by inserting other allegations material to the case" etc. But this, we take it, does not contemplate the amendment of a pleading when, as in this case, it would raise a different issue from that which was presented to the court below, and upon which the case was brought to this court. An amendment to a

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pleading will not be allowed in this court when it would change the issue and cause the reversal of a judgment which was free from error at the time it was entered. See *Harrison v. Magoon*, 16 Haw. 485.

As to the statute of limitations. We are of the opinion that the right to maintain this action was barred by the lapse of time. In actions of this character the period of limitation is six years. R. L. 1915, Sec. 2633. A covenant for quiet enjoyment of leased land is a continuing covenant. Successive actions may be maintained for separate breaches of the covenant, and an action upon one breach may be prosecuted though one upon a former breach has become barred. But in the case at bar but one breach of the covenant is alleged to have been committed, and that occurred on September 1, 1894, when, as alleged, the lessee essayed to enter into possession but was prevented from obtaining any possession, use or enjoyment of the demised premises. Thereupon the lessee, if her inability to obtain possession was due to the fault of the lessors, was at liberty to treat the lease as repudiated or abandoned, and to refuse to pay further rent, and, if sued for rent, to defend against the action on that ground. Or, treating the breach as entire, she could have instituted an action against the lessors upon their covenant for quiet enjoyment, in which case she could have recovered, as damages, the rent which she had paid in advance and the value of the term, if any, over and above the amount of the rent reserved in the lease. 24 Cyc. 922; 18 A. & E. Enc. Law (2nd ed.) 628; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Dobbins v. Duquid*, 65 Ill. 464; *Wertheimer v. Rosenbaum*, 146 N. Y. S. 177; *Wagon Works v. Gunn*, 80 S. E. Ga. 668; *Graves v. Brownson*, 120 S. W. (Tex.) 560. It appears that neither of these courses was followed and that the lessee has been obliged to continue to pay the rent or has incurred judgment therefor. Counsel for the appellant is mistaken in the

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view that each payment of rent, or each judgment obtained by the lessors was a new and separate breach of the covenant, and that this action may be maintained upon that theory for the recovery of any such payment or the amount of any such judgment as may have been made or incurred within six years of the date of the commencement of this action. The covenant for quiet enjoyment is broken only by an interference with the physical possession of the land. In this case the interference occurred, as shown by the complaint, more than six years ago. The rule which applies in cases of continuing trespass or nuisance and of recurring injury resulting from an act not in itself unlawful is not applicable to cases such as this.

In *Aachen etc. Ins. Co. v. Morton*, 156 Fed. 654, 656, 657, the court said, "A right of action accrues whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will give a right to then bring and sustain a suit. That the statute begins to run from the time a right of action accrues, without regard to when the actual damage results, is well settled. * * * If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages developed, although all the consequential injuries had one common root in the single original breach or wrong. This would in effect nullify the statute." In the present case, as above pointed out, the plaintiff could have recovered, in an action

Quarles, J., concurring.

brought within six years after the ouster, not merely nominal but substantial and complete damages. Covenants of warranty and for quiet enjoyment are the same in general effect, and it is held that where at the time of a conveyance the land is in the possession of one claiming under a paramount title a covenant of warranty is broken immediately and the statute begins to run at once. *Eustis v. Cowherd*, 23 S. W. (Tex.) 737; *Durand v. Williams*, 53 Ga. 76.

The exception is overruled.

M. F. Scott for plaintiff.

E. K. Aiu for defendants.

CONCURRING OPINION OF QUARLES, J.

The conclusion that the complaint is insufficient in that it failed to allege that plaintiff was kept out of possession by the acts of the defendant lessor, or persons claiming under the defendant, or by reason of title paramount to that of the defendant, is, in my opinion, correct, for which reason the demurrer was properly sustained, and the judgment must be affirmed.

That the covenant for quiet enjoyment is a continuing one I agree is a correct statement of law; but, in my opinion, it necessarily follows that the rights and obligations thereunder are also continuing. The covenant of quiet enjoyment is one running with the land (7 R. C. L. 1105, par. 21, 1145, 1146, par. 58; 11 Cyc. 1088) and is one of assurance or indemnity (7 R. C. L. 1145, par. 58; 11 Cyc. 1072). It is true that when the lessee is prevented from taking possession, or disturbed in his possession by one claiming a paramount title, or by his lessor or those claiming under the lessor, the covenant is broken and the lessee may treat the lease as terminated and elect to treat his injuries as permanent and sue for damages, or he may treat the breach as temporary or continuing damages, and sue for the same as they arise from time to time. The reason

Quarles, J., concurring.

for this rule is well stated in 8 R. C. L., under the head of Damages, sections 96 and 97, wherein it is said, *inter alia*: "The damages in such case are called temporary or continuing damages, and the recovery is limited to them when the injury is intermittent and occasional, or the cause thereof remediable, removable or abatable. They are given on the theory that the injury may and will be terminated. The law contemplates that the plaintiff himself may be able to abate the cause of the injury or relieve the property from its ill effects, or that the defendant will remove it, as he is under legal obligation to do, rather than submit to having the entire damages recovered against him for a permanent injury or subject himself to the infliction of repeated judgments for temporary damages. For this reason it is thought to be unjust to allow a recovery of damages in excess of the injury already sustained, as future damages might not ensue."

It has been held that where the grantor in a deed conveying land covenanted that he would perpetually maintain a fence along a railroad running through the land, failure for twenty years to maintain such fence did not impair the obligation to maintain it (*Bronson v. Coffin*, 108 Mass. 175). Covenants of seizin, of right to convey, and against encumbrances are broken, if at all, at the time of the execution of the deed, and limitation immediately starts to run. This is not true as to covenants of warranty or for quiet enjoyment, covenants which run with the land, and which may be broken at any time, and if broken, the plaintiff may remedy the damage and look to the defendant for compensation, or the defendant may remove the ill effects of the breach. The covenant being one of indemnity or assurance, the lessee may look to the lessor to restore possession to him, if it has been delivered to him, or if such possession has not been delivered to him, he may continue to look to the lessor to deliver such possession, in the mean-

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while holding the lessor responsible for the temporary or continuing damage that is sustained. The covenant for quiet possession being a continuing one, the lessee may stand on the covenant, elect to treat the lease as a subsisting one, and look to the lessor for damages that accrue from a breach of the covenant, and may recover at any time the damages that have accrued from such breach, at least within six years after they accrue.

A. F. CASSELS *v.* CHARLES T. WILDER, TAX ASSESSOR AND COLLECTOR OF THE FIRST TAXATION DIVISION OF THE TERRITORY OF HAWAII.

No. 928.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MAY 31, 1916.

DECIDED JUNE 17, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

TAXATION—*privately owned property of Federal agent.*

The fact that property privately owned by an agent of the Federal government is largely used by him in the performance of his official duties does not render it exempt from territorial taxation.

OPINION OF THE COURT BY WATSON, J.

The petitioner, who is an officer in the United States Army, stationed at Schofield barracks in the city and

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county of Honolulu, seeks by his amended bill to enjoin the respondent as tax assessor and collector from collecting or attempting to collect a tax assessed against an automobile, the private property of petitioner, on the ground that the automobile is largely used in the performance of his duties as an officer of the United States Army. A demurrer to petitioner's original bill having been sustained by the lower court in accordance with the views of this court (*Cassels v. Wilder*, ante p. 61) petitioner asked and was granted leave to file an amended bill, the allegations of which are similar to those contained in the original bill except for the following additional averments (Par. 6): "That the said automobile was on the said 1st day of January, 1915, and the same still is largely used and operated by your petitioner in the performance or discharge of his official duties as an officer of the United States Army as aforesaid, and during all of said time has been a necessity in connection with the performance of the said official duties so performed by him." Paragraph 10 of the amended bill contains the additional allegation that petitioner's automobile "was on the said 1st day of January, 1915, and still is used and operated by your petitioner herein in the performance and discharge of his official duties as aforesaid."

The cause was heard upon the amended bill, answer and evidence adduced by the petitioner and a decree was duly entered by the circuit judge dismissing said amended bill at petitioner's cost and dissolving the temporary injunction theretofore issued. From this decree the appeal is taken.

Without entering into a detailed discussion of the evidence, suffice it to say that in our opinion it was ample to sustain the allegations of the amended bill of complaint—that petitioner's automobile is used by him largely in the performance and discharge of his official duties. It is contended by petitioner that by reason of this fact his auto-

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mobile is exempt from territorial taxation as an instrument used in connection with services performed by him for the Federal government. This contention cannot be sustained. In *Railroad Co. v. Peniston*, 18 Wall. 5, 33, the distinction which to our minds is controlling in the case at bar is clearly pointed out between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government. In that case it was said, distinguishing the cases of *McCulloch v. The State of Maryland*, 4 Wheat. 316, and *Osborn v. Bank of U. S.*, 9 Wheat. 738:

"It may therefore be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such an agent. * * * It is therefore manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson v. Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that it is an interference with the exercise of any power belonging to the general government,

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and if it is not it is prohibited by no constitutional implication."

It has frequently been decided by the supreme court of the United States that a state tax upon the property of an agent of the government is not prohibited simply because it is the property of such agent. *Railroad Co. v. Peniston*, *supra*; *Thomson v. Railroad Co.*, 9 Wall. 579; *Central Pac. R. Co. v. California*, 162 U. S. 91; *Reagan v. Trust Co.*, 154 U. S. 413. There is no statute, rule or regulation requiring an officer of the United States Army to purchase or own an automobile, or, in the event of such ownership, requiring him to use the same in the performance of his official duties. While it appears from the evidence that such use is, by his superior officers, apparently expected of an officer who owns an automobile, the automobile is only a necessity, as testified to by petitioner, in the sense that he could perform his duties more rapidly, conveniently and expeditiously by the aid of an automobile than he could perform such duties with the equipment provided by the government. In our opinion the fact that an officer of the army, admittedly an agent of the government, employs his private property in the service of the government attaches to it no immunity whatever.

The decree appealed from is affirmed.

P. R. Bartlett (*Holmes & Olson* on the brief) for petitioner.

Capt. J. A. Gallogly was permitted to submit an argument on behalf of petitioner.

I. M. Stainback, Attorney General, for the assessor.

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LEONG YAU v. WILLIAM T. CARDEN.

No. 940.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED JUNE 13, 1916.

DECIDED JUNE 26, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MALICIOUS PROSECUTION—essential elements—pleading.

A complaint which alleges that a criminal proceeding was instituted against the plaintiff by the defendant; that it was done without probable cause and with malice on the part of the defendant; that the proceeding terminated in favor of the plaintiff; and that the plaintiff sustained damage, states a case of malicious prosecution.

SAME—termination of original proceeding—*nolle prosequi*.

A *nolle prosequi*, when not entered at the instance or with the consent of the defendant, is a sufficient termination of the proceeding upon which to found a claim for damages for malicious prosecution.

SAME—liability of prosecuting officers.

A public prosecuting officer is not to be held liable in damages for an honest mistake or mere error of judgment in instituting criminal proceedings; but if he proceeds maliciously and without probable cause, he will render himself liable in damages to the party injured.

OPINION OF THE COURT BY ROBERTSON, C.J.

In an action for damages for malicious prosecution the circuit court overruled a demurrer to the plaintiff's complaint and allowed an interlocutory bill of exceptions. It was alleged in the complaint that the defendant, at all times mentioned therein, was a deputy city and county attorney of the city and county of Honolulu, whose duty it was to investigate charges of crime, and, in proper cases,

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to prosecute the same; that on or about the 3rd day of December 1915, the defendant falsely and maliciously and without reasonable or probable cause therefor, instituted criminal proceedings against the plaintiff by signing and filing a false and malicious affidavit and complaint before a judge of the circuit court of the first circuit charging the plaintiff with having violated the law against usury (R. L. 1915, Sec. 3443), a misdemeanor; that the defendant maliciously and without probable cause influenced and prevailed upon said judge to issue a warrant for the arrest of the plaintiff, and delayed the arrest of the defendant until the night-time of said day, and caused the sheriff, who made the arrest, to hold the plaintiff to bail in the unreasonably large sum of one thousand dollars; that on December 4 the circuit judge reduced the bail to the sum of five hundred dollars; that thereafter, on the 4th, 6th, 10th and 21st days of January 1916, the defendant appeared in the circuit court and demanded trial of the case, but the prosecution objecting the case was repeatedly postponed until January 24 when it was dismissed by the city and county attorney, and the plaintiff was thereupon discharged by the court; that the proceeding was then and there wholly ended and determined; and that by reason and as a result of such malicious prosecution the plaintiff was damaged, etc. The defendant demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action against him; and that it appeared from the complaint that the acts and things therein complained of were done by the defendant in pursuance of his official duties as a deputy city and county attorney.

On behalf of the appellant it is contended that the allegations of the complaint as to obtaining the issuance of the warrant of arrest are insufficient, being mere conclusions and not statements of fact; that the complaint

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does not show that the original proceeding complained of has been terminated in favor of the defendant therein; and that the appellant as a public prosecuting officer is not liable to respond in damages in a civil action touching his official conduct. In support of the first point it is urged that it was the duty of the circuit judge to decide whether the facts were sufficient to justify the issuance of a warrant of arrest, and that the appellant should not be held responsible for the action taken by the circuit judge as to which he, of course, had no control. The case of *Gomez v. Whitney*, 21 Haw. 539, is cited. That was a case of false imprisonment, and it was there held that the attorney-general, who had submitted to a circuit judge an affidavit of certain facts upon which the judge, in excess of his jurisdiction, issued an order upon which the plaintiff, a proposed witness in a criminal case, was committed to jail pending his giving a recognizance to appear and testify, was not liable in damages because of the illegal imprisonment. That case does not help the appellant here. There, as stated by the court, it was not claimed that the attorney-general had made any misrepresentation as to the facts or used any other improper means to secure the order; whereas here it is alleged the affidavit which the defendant made was false and malicious, and that the whole proceeding was without probable cause. It would be going to a very great length to say that one who has by false representations induced a judge to issue a warrant of arrest may, in case trouble follows, hide behind the judge's action. It is alleged in the complaint that a criminal proceeding was instituted against the plaintiff by the defendant; that it was done without probable cause and with malice on the part of the defendant; that the proceeding terminated in favor of the plaintiff; and that the plaintiff sustained damage. Such allegations state a case of malicious prosecution. 13 Enc. Pl. &

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Pr. 427; *Kerr v. Hyman*, 6 Haw. 300; *Lyons v. Coal Co.*, 84 S. E. (W. Va.) 744; *Chicago etc. R. Co. v. Holliday*, 30 Okl. 680. Next, it is argued that the complaint does not show that the criminal proceeding terminated in favor of the defendant. It is alleged that the case was dismissed by the prosecution and that the defendant was discharged by the court. In other words, that the defendant was discharged upon the entry of a *nolle prosequi*. In 26 Cyc. 60, it is stated that "There are authorities holding that an action of malicious prosecution will not lie on the entry of a *nolle prosequi*. The greater weight of authority, however, is that it is a sufficient termination of the prosecution to authorize defendant to sue for malicious prosecution, when entered with the consent of the court, for reasons other than an irregularity or informality in the indictment, and when not entered at the instance or with the consent of defendant." The rule in this jurisdiction is in accord with the weight of authority. *McCrosson v. Cummings*, 5 Haw. 391; *Stone v. Hutchinson*, 4 Haw. 117. The argument advanced under the third point is to the effect that the appellant, as a deputy city and county attorney, is, by statute, a deputy attorney-general of the Territory; that he is a public prosecutor; that public prosecutors are judicial officers; and that a judicial officer is not liable in damages for acts done in the course of his duty, even though wilful and malicious. Counsel for the defendant are in error in assuming that all judicial officers are under all circumstances exempt from civil liability for the invasion of private rights. In the leading case of *Bradley v. Fisher*, 13 Wall. 335, 351, the supreme court said, "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must here be observed between excess of jurisdiction and the clear ab-

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sence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." The decision in that case was followed by this court in *Gomez v. Whitney, supra*. A judge of a court of general jurisdiction in deciding disputed questions of jurisdiction acts judicially, and, consequently, it would be an extreme case where such a judge would be acting in "the clear absence of all jurisdiction," but neither of those cases, nor any decided case that we are aware of, sustains the idea that under no possible circumstances may a judge of even superior jurisdiction be within the pale of civil accountability. In the case of *Spalding v. Vilas*, 161 U. S. 483, an action for damages against the postmaster-general of the United States, the court held that the general principle applicable to judges of courts of superior jurisdiction applies by analogy to the heads of the executive departments of government. And the court said (p. 498), "As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision." As to the liability of judges of courts of limited and inferior jurisdiction different views have been expressed. What is said to be the weight of authority is to the effect that such judges are liable whenever they act in excess of their jurisdiction (23 Cyc. 569), though some courts, strongly dissenting from that view, maintain that the rule applied to courts of general jurisdiction ought to be applied likewise to those of limited jurisdiction. See cases cited in 21 Haw. 547. In *Alau v. Everett*, 7 Haw. 82, one of the defendants, a police

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judge, was held liable in an action for damages for punishing a party for contempt of court for violation of an order made by him in excess of his jurisdiction. So much for the legal liability of judicial officers. Is a public prosecuting officer a judicial officer? In a broad sense the term "judicial officer" would include any public officer who exercises judicial powers in or out of court. In a stricter and more accurate sense it would be limited to such as exercise judicial functions in court. See Newell on Malicious Prosecution, 125; *People v. Salsbury*, 134 Mich. 537. In Bouvier's Law Dictionary it is stated that "executive officers are those whose duties are mainly to cause the laws to be executed," and that "judicial officers are those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with violations of the law." Public prosecuting officers are, properly speaking, executive officers. Though, like all enrolled attorneys, they are officers of the courts, they are not part of the courts. In discharging their duties executive officers are at times required to perform acts of a judicial nature, but even then they act no more than quasi-judicially. In 32 Cyc. 717, it is said "A prosecuting attorney, being a judicial officer of the state, is not liable in damages for acts done in the course of his duty, although wilful, malicious, or libelous." The only case cited in the note which sustains the statement of the text is *Griffith v. Slinkard*, 146 Ind. 117. That case is relied on by the defendant in this case. We doubt the correctness of the conclusion reached by the court in that case, and are not disposed to follow it here. Mr. Newell, in his work above cited, says, at page 166, "The functions of a quasi-judicial officer are those which lie midway between the judicial and ministerial ones. The lines separating these from such as are thus on their two sides are necessarily indistinct; but in general terms, when the law, in words or by implica-

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tion, commits to any officer the duty of looking into the facts and acting upon them, not in a way which it specifically directs, but after a direction in its nature judicial, the function is termed quasi-judicial. The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply equally as well to the quasi-judicial officer. He cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided that judgment may be." In *Pike v. Megoun*, 44 Mo. 491, 496, the court said, "to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty." In *Skeffington v. Eylward*, 97 Minn. 244, the chairman of a board of town supervisors was held liable in an action of malicious prosecution. The court, in its opinion (p. 248), said, "It is further urged on behalf of the defendant that, because it was his official duty to prosecute all persons violating the provisions of the statute relating to the obstruction of public highways, he is not liable for a mistake of judgment, even if another has suffered by the mistake. If he acted upon probable cause, this would be true; otherwise not. The fact that he acted in his official capacity in making the complaint was, as the jury were instructed, a matter to be considered by them in determining the question of probable cause." The case of *Gasper v. Nahale*, 14 Haw. 574, was an action for damages for malicious prosecution against a deputy sheriff. Deputy sheriffs are authorized by law to prosecute criminal cases in the district courts, but there was no intimation in that case that they may not be

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liable in damages for a malicious prosecution. It was there said, "If an officer acts honestly and with ordinary discretion in commencing prosecutions against persons accused of crime public policy forbids that he should be annoyed and harassed by suits for malicious prosecutions even in cases where the district magistrate may dismiss the charges." There is nothing in that statement inconsistent with the view that public prosecutors may render themselves liable by acting with malice and without probable cause.

A public prosecuting officer, in determining whether certain purported facts which have been brought to his attention justify the accusation and prosecution of a person believed to have committed an offense, acts in a quasi-judicial capacity, and he is not to be held liable in damages for an honest mistake or error of judgment in instituting a criminal proceeding against such person. But if he prosecutes without probable cause and with malice he certainly is in no better position than the judge of a court—superior or inferior—who proceeds maliciously and without any jurisdiction, or the head of an executive department who acts maliciously and without color of authority. Public prosecuting officers are entitled to protection against claims growing out of the discharge of their duties done in good faith though with erroneous judgment, but private individuals are entitled to the protection of the law against any conduct of such officers which is at once reckless, malicious and damaging. We are here dealing with a demurrer to a complaint, and we are of the opinion that the complaint states a case to which the defendant must answer.

The exceptions are overruled.

L. Andrews and W. B. Pittman for plaintiff.

F. W. Milverton (Thompson, Milverton & Cathcart on the brief) for defendant.

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KOTARO TAKAMOTO v. TSUNE HORITA.

No. 944.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED JUNE 27, 1916.

DECIDED JULY 3, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

JUDGMENTS—default—reasons for opening—discretion.

The statute, R. L. 1915, Sec. 2363, authorizing the opening of defaults, should be liberally applied by the courts. On appeal the question is whether the trial court abused its discretion. Good and sufficient reasons for opening a default will not be shown to exist unless it be made to appear that the defendant moved with diligence after the default was entered, that he has a meritorious defense, and that he has a reasonable and satisfactory excuse for not having answered.

SAME—setting aside judgment after default.

Where a final judgment has been entered in a case after an order of default the application should be to set aside the judgment as well as to open the default.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an action of assumpsit in which the plaintiff obtained judgment in the court below after default by the defendant. The defendant brings an exception to the denial of her motion to reopen the order of default. The situation may be stated as follows: On December 20, 1915, summons was served on the defendant; on January 9, 1916, the time for answering expired; on January 12, plaintiff's motion for an order of default was filed, and an order thereon made and entered; on January 25, the case was heard, jury-waived, upon the plaintiff's proofs; on January 28, the court filed its decision in favor of the plain-

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tiff, and judgment accordingly was entered; thereafter, on the same day, the defendant filed a motion to set aside the default; and on March 11, the motion was denied. In her affidavit filed in support of the motion the defendant set up by way of defense upon the merits to a part of the plaintiff's claim that the claim included usurious interest. By way of reason or excuse for not having answered within the time limited in the summons the defendant deposed that immediately after service of summons upon her she had an interview with the plaintiff with the view to securing a reduction of the claim, particularly in the matter of interest; that thereafter, on four or five occasions, she had further interviews with the plaintiff and his agent with a view to compromising the claim, and, on January 25, believed that it would be possible to obtain a compromise, and therefore did not consult an attorney; that at an interview on the morning of the last mentioned date the plaintiff consented to a reduction of the amount of interest which the defendant agreed to take under consideration, but that on the afternoon of that day she learned that the plaintiff had secured judgment against her, whereupon she consulted her attorney; that she is a Japanese woman who does not understand the English language, is unaccustomed to legal proceedings, and did not know that it was necessary for her to file an answer while negotiations for a compromise were in progress; and that, though able and willing to pay the plaintiff whatever is legally due him, she is unable to pay interest at the rate of two per cent. per month which, as she says, the plaintiff claimed. It is evident that the defendant fully understood that the plaintiff had commenced an action in court against her, and that in order to defend the case it was incumbent on her to make answer. The most that can be made of the affidavit, aside from the fact that she had a defense to a part of the plaintiff's claim, is that through ignorance on the part of the

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defendant she supposed that pending the negotiations which she started she need not answer in court. But she sought no advice. She does not claim that the plaintiff intended to deceive or defraud her, and according to her statement she did not conclude that a compromise was possible until thirteen days after the order of default had been entered. The record does not show, but counsel agreed at the argument, that the plaintiff asked leave to rebut the statements made in the defendant's affidavit. The circuit court held, however, that the showing made was insufficient without its being rebutted.

The circuit court was authorized, under the statute, in its discretion and for "good and sufficient reasons" to open the default. R. L. 1915, Sec. 2363. The statute is broad and should be liberally applied by the courts. *Bond v. Hawaiian Gazette Co.*, 22 Haw. 60, 64. There is a discretion in the court to whom the application is made and though this court will reverse an order either granting or denying a motion to open a default where the discretion has been abused (*Ayers v. Mahuka*, 9 Haw. 377; *Bond v. Hawaiian Gazette Co.*, *supra*), the question on appeal is not whether this court would have taken certain action originally, but whether there was an abuse of discretion on the part of the trial court. *Tibbets v. Pali*, 14 Haw. 517; *Kapiolani Estate v. Grinbaum*, *id.* 583; *Byrne v. Orpheum Company*, 16 Haw. 786. It is said that it requires a stronger showing to justify the interference of an appellate court when a default has been opened than when an opening has been denied. When the defendant in a law action fails to answer as required by statute or rule of court the plaintiff is entitled to demand and receive an order declaring the defendant in default. R. L. 1915, Sec. 2361. Good and sufficient reasons for opening the default will not be shown to exist unless it be made to appear that the defendant moved with diligence after the default was entered against

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him, that he has a meritorious defense to the whole or a part of the plaintiff's claim, and that he has a reasonable and satisfactory excuse for not having answered within the time limited. What will constitute such an excuse must naturally depend on the circumstances of each case. In the case at bar a meritorious defense to a part of the claim was shown. But "it is not enough that" the defendant "has a meritorious defense to the action; he must give a sufficient reason for the omission to plead it in due season." 23 Cyc. 930. See *Schultz v. Meiselbar*, 144 Ill. 26; *Parks v. Coyne*, 156 Mo. App. 379, 391; *American Brewing Co. v. Jergens*, 21 Ind. App. 595, 598; *School v. Peirce*, 163 N. C. 424, 428; *Cowton v. Anderson*, 1 How. Pr. 145; *Edwards v. Janesville*, 14 Wis. 27. Ignorance of the English language might be regarded as a partial excuse, but here, besides mere ignorance, there was clear negligence. The defendant knew that she was required to make answer in court and she should have inquired, if not of a lawyer, of some one else, when her answer was due. It would be a dangerous rule to lay down that a supposition that it was not necessary to file an answer so long as negotiations for a settlement of the case were pending constitutes a good excuse for not answering. We assume, without deciding, that the defendant moved with diligence to have the default opened, but hold that, under the circumstances, there was no abuse of discretion on the part of the court below in denying the motion because of the defendant's laches in not answering.

It may be well to point out that the defendant's motion, which was merely to set aside the default, was defective. In a case where, as here, a final judgment has been entered, the application should be to open the default and set aside the judgment since the mere opening of the default without also setting aside the judgment would not effect the desired purpose.

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The exception is overruled.

C. S. Franklin (Thompson, Milverton & Cathcart on the brief) for plaintiff.

J. Lightfoot for defendant.

LUDWIG WEINZHEIMER *v.* DAVID K. KAHAULE-
LIO AND ELLEN K. KAHAULELIO.

No. 951.

MOTION TO DISMISS.

SUBMITTED JUNE 30, 1916.

DECIDED JULY 3, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*bill of exceptions—extension of time.*

While an order extending the time in which to present a bill of exceptions indefinitely would be void, yet an order made within the time in which the bill of exceptions might have been presented, extending the time for presenting the bill of exceptions *twenty days after typewriting and filing transcript of the evidence by the official court stenographer with the clerk of the court*, is not void for uncertainty; reference in the order to the filing of the transcript of the evidence made the time of extension certain, fixed and definite.

OPINION OF THE COURT BY QUARLES, J.

This action was one of ejectment tried by the circuit court of the second circuit sitting without a jury. The decision and judgment were filed March 8, 1916, in favor of the plaintiff. March 14, 1916, the defendants applied to the circuit judge for an extension of time to present their bill of exceptions and the following order was made: "It is ordered that the defendants be granted 20 days after

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the preparation and filing with the clerk of this court, by the official stenographer of this court, of the transcript of evidence adduced at the hearing of said cause, within which to prepare and present to this court their bill of exceptions."

The official stenographer completed the transcript of evidence and certified it as of the 10th day of April and it was filed with the clerk of the court on the 11th day of April. April 25 defendants presented to the circuit judge their bill of exceptions and served a copy of the same, pursuant to Rule 33 of the rules of the circuit court of the second circuit, upon counsel for plaintiff. Under said rule counsel for the plaintiff had five days, or such additional time as the court should allow, in which to file objections to the bill of exceptions. No objections to the bill of exceptions appear to have been filed in the circuit court, and, on the 2d day of May, 1916, the circuit judge allowed and certified the bill of exceptions. The plaintiff has filed a motion to dismiss the bill of exceptions for the reasons (1) that the bill of exceptions was not filed within the time provided by law; (2) the order purporting to extend the time for presenting the bill of exceptions is "vague, indefinite, uncertain and void, and because said order does not specify a day certain, or fix a definite time within which the bill of exceptions of the said defendants might be filed in the circuit court of the second judicial circuit, or presented to the judge thereof for allowance."

We think the order extending the time is sufficiently definite. It gave defendants twenty days after, that is, from the completion and filing with the clerk of the court of the transcript of the evidence by the official stenographer, in which to prepare and present their bill of exceptions. The transcript was filed April 11. *Certum est quod reddi potest*. The uncertainty, if any existed, as to the time the extension granted by the order would expire, was removed by the filing of the transcript with the clerk by the

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stenographer. An order extending time in which to present a bill of exceptions indefinitely would clearly be void. The order complained of here by reference to the filing of the stenographer's transcript with the clerk obviated the objection of uncertainty raised by the plaintiff. The reference in the order to the filing of the stenographer's transcript made the order certain and definite (*Magoon v. Lord-Young Eng. Co.*, 22 Haw. 327, 345). An order extending time, similar to the one in question here, was approved in *Harrison v. Magoon*, 16 Haw. 170. It has been the practice in this jurisdiction for the circuit courts and judges to make similar orders to the one under consideration. We do not feel authorized to disturb this practice or to overrule the decision on this point in *Harrison v. Magoon*, *supra*, or to do otherwise than recognize the rule there laid down until it shall have been changed by statute or court rule.

The motion is denied.

Thompson, Milverton & Cathcart for movant.

E. R. Bevins contra.

MAE B. ZUMWALT v. J. L. W. ZUMWALT.

No. 911.

ERROR TO CIRCUIT JUDGE, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

ARGUED JULY 11, 1916.

DECIDED JULY 18, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

DIVORCE—*residence*—*domicil*.

In statutes relating to divorce the term "residence" is used in the sense of and as the equivalent of "domicil."

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SAME—*separate domicil of wife.*

The domicil of a married woman is that of her husband, and she may not acquire a separate domicil by living apart from her husband where it is not shown that he had given her cause for divorce prior to the separation.

SAME—*statutory requirement as to residence—jurisdiction.*

The provisions of section 55 of the Organic Act and section 2927 of the Revised Laws, 1915, that the applicant for a divorce shall have resided in this Territory for two years next preceding the application, are mandatory and jurisdictional, and a circuit judge is without authority to grant a divorce in the absence of proof of domicil for the necessary length of time.

OPINION OF THE COURT BY ROBERTSON, C.J.

The libellant, now defendant in error, instituted a suit for divorce from her husband in the fourth judicial circuit on the 24th day of August, 1915. The grounds upon which the divorce was sought, as set forth in the libel, were the extreme cruelty of the husband during six months then last past, and his refusal to provide suitable maintenance for his wife for a continuous period of more than ninety days, though able to furnish same. The circuit judge found that the allegations as to the extreme cruelty of the libellee had been proven and on that ground granted the decree prayed for.

The only question which we find it necessary to pass on is that as to the jurisdiction of the circuit judge to entertain the suit and grant the decree. The point made by the plaintiff in error is that the libellant had no right under the law to institute or maintain the suit since she had not acquired a domicil in this Territory as required by law. Section 55 of the Organic Act of this Territory provides that "No divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory unless the applicant therefor shall have resided in the Territory for two years next preceding the application." Section 2927 of the Revised Laws provides the same re-

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quirement as to residence. It was shown that the parties were married in this Territory on December 27, 1893; that in 1902 the family moved to Colusa, California, where the libellee engaged in the grocery business and purchased a home; that the business prospered for a time but afterwards declined, and the libellee began to consider returning to Hawaii; that in 1912 the parties were visited by the libellant's mother, on whose return to Hilo in that year she was accompanied by two of the parties' children; that shortly after that one of the children wrote to the libellant informing her that the grandmother was in poor health and suggesting that she should come to Hilo; that the parties agreed that the libellant should go to Hilo and stay with her mother, and that the libellee would follow as soon as he could sell his property and close out the business; that the libellant with her youngest child went to Hilo in June 1913; that the libellee remained at Colusa with one child until in September 1914, when he finally sold the home and closed out the business, and arrived in Hilo on October 1, 1914, and, finding employment, has continued to live there. There was some conflict in the testimony as to the relations between the parties up to the time the libellant left Colusa, but it is not contended that any ground for divorce existed or that she went to Hilo otherwise than pursuant to the mutual arrangement stated.

On behalf of the defendant in error it is contended that upon the circumstances related the libellant had had a *bona fide* residence in the Territory from the time of her arrival in Hilo and, therefore, for upwards of two years prior to the commencement of the suit, so that the requirement of the law was satisfied; that a wife may have a different domicil from that of her husband; and that the libellee is estopped, by reason of his acquiescence to his wife's going to Hilo, from claiming that she had not acquired a legal residence or domicil there.

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A distinction is drawn between a residence and a domicil. In Bouvier's Law Dict. (8th ed.) 2920, it is said, "A residence is different from a domicil, although it is a matter of great importance in determining the place of domicil. The essential distinction between residence and domicil is that the first involves the intent to leave when the purpose for which one has taken up his abode ceases. The other has no such intent; the abiding is *animo manendi*. One may seek a place for the purposes of pleasure, of business or of health. If his intent be to remain, it becomes his domicil; if his intent be to leave as soon as his purpose is accomplished, it is his residence." But in statutes relating to divorce the term "residence" is used in the sense of and as the equivalent of "domicil." *Downs v. Downs*, 23 App. Cas. (D. C.) 381, 388; *Sneed v. Sneed*, 14 Ariz. 17; *King v. King*, 74 N. J. E. 824; *Humphrey v. Humphrey*, 115 Mo. App. 361, 363; *Harrison v. Harrison*, 117 Md. 607, 612; *Cohen v. Cohen*, 84 Atl. (Del.) 122; *Bechtel v. Bechtel*, 101 Minn. 511, 515; *Andrews v. Andrews*, 176 Mass. 92; *deMeli v. deMeli*, 120 N. Y. 485. The libellant's domicil was that of her husband (14 Cyc. 846) and his domicil, two years prior to the commencement of the suit, was in California where he had maintained a permanent residence since 1902. His mere intention to dispose of his property there and return to this Territory did not terminate that domicil. "The acquisition of the new domicil must have been completely perfected and hence there must have been a concurrence both of the *factum* of removal and the *animus* to remain in the new locality before the former domicil can be considered lost." 14 Cyc. 852. It is true, as contended by counsel for the defendant in error, that for purposes of divorce the wife may acquire a domicil of her own distinct from that of her husband, but, as the authorities show, that is where he has given her cause for divorce prior to the separation. *Barber v. Barber*, 21 How. 582, 595;

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Haddock v. Haddock, 201 U. S. 562, 570; *Williamson v. Osenton*, 232 U. S. 619; *Michael v. Michael*, 79 S. W. (Tex.) 74; *Kendrick v. Kendrick*, 188 Mass. 550; *Sneed v. Sneed*, *supra*. We fail to see why the libellee should be held to be estopped from claiming that the libellant had not had a domicil in this Territory for the required length of time. We hold that under the circumstances of this case the libellant's residence in this jurisdiction did not commence before her husband arrived at Hilo, and that her suit was prematurely brought.

This court has held that the statutory provision that causes of divorce shall be triable only in the circuit where the parties last lived together as man and wife, or, if they have not so last lived together in this Territory, in the circuit where the applicant resides, is jurisdictional and cannot be waived by the parties. *Martello v. Martello*, 19 Haw. 243. So also as to the statutory provision that jurisdiction of a libel for divorce shall not be entertained until at least thirty days after service of summons on the libellee. *Markle v. Markle*, 20 Haw. 633. And we hold that the provisions of the Organic Act and the statute of this Territory as to the residence of the libellant for two years next preceding the commencement of a suit for divorce are mandatory and jurisdictional, and that the circuit judge was without authority to grant the decree in the absence of proof of domicil for the necessary length of time. See *Bradfield v. Bradfield*, 154 Mich. 115; *Prall v. Prall*, 50 So. (Fla.) 867; *Lawrence v. Nelson*, 113 Ia. 277; *Rumping v. Rumping*, 36 Mont. 39; *Holton v. Holton*, 64 Ore. 290.

The decree is reversed and the cause is remanded to the circuit judge with direction to dismiss the libel.

J. W. Russell for plaintiff in error.

H. L. Ross (*W. S. Wise* and *E. A. Mott-Smith* with him on the brief) for defendant in error.

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MANUEL F. COSTA v. MARY PINHERO COSTA.

No. 942.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED JULY 3, 1916.

DECIDED JULY 18, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

DIVORCE—*failure to provide.*

A wife is not entitled to a divorce on the ground of failure to provide if she deserts her husband or lives apart from him without reasonable cause.

SAME—*desertion—offer to return.*

In order to bar a suit for divorce on the ground of desertion an offer by the deserting spouse to return must be made before the period of desertion is complete and the other party has acquired a right to a divorce.

OPINION OF THE COURT BY WATSON, J.

On the 29th day of November, 1915, Manuel F. Costa filed his libel praying for an absolute divorce from his wife, Mary Pinhero Costa, on the ground that she had utterly and wilfully deserted him ever since the 18th day of February, 1914. Libelee filed an answer and cross-libel. In her answer she denied all the allegations of the libellant's libel with the exception of the allegations relative to the marriage and to the issue of said marriage. In her cross-libel she prayed for an absolute divorce from her husband on the ground of his failure and refusal to provide her with suitable maintenance, though of sufficient ability so to do, for a period of more than sixty days prior to the filing of the libel. She also prayed that the care, custody and control of the three children, surviving issue of said marriage, be awarded to her and that her husband be required to

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make suitable provision for the support of said children. Libellant's libel was afterwards amended so as to include a prayer for the custody of the three children. An answer was also filed by libellant denying the material allegations of the libelee's cross-libel, and thereafter the libel and cross-libel were heard together in open court upon evidence adduced by each of the parties. The parties having rested, the cause was submitted without argument and thereafter the court rendered a decree in favor of libellant dissolving the bonds of matrimony theretofore existing between said Manuel F. Costa and Mary Pinhero Costa on the ground of the desertion of the libellee for a period of more than one year, and awarding to libellee the custody of the children. From this decree libellee has appealed to this court specifying as error that the court erred in finding libellee guilty of wilful and utter desertion and in granting a divorce to libellant on that ground, and that the court erred in denying the libellee a divorce from the libellant on the ground of non-support, as prayed for in her cross-libel.

These alleged errors will be considered together, as it is of course well settled that a wife is not entitled to a divorce on the ground of failure to provide if she deserts her husband or lives apart from him without reasonable cause. The evidence in this case shows that the parties were married in 1907 and lived together continuously thereafter until February, 1914; that there were five children born to them, issue of their said marriage, of whom three were living at the time of the institution of the divorce proceedings; that the parties last lived together as husband and wife at Kahului, Maui; that on February 16, 1914, the husband, having lost his job at Kahului, sent his wife and children, together with the household furniture, in a wagon from Kahului to Makawao, Maui. Libellant testified that he had rented a house at Makawao for his family to live

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in, and, on the departure of libellee from Kahului, told her to go with the children and furniture to the house he had so rented; that upon her departure he gave her \$80 with which to provide herself and children with provisions and other necessities upon their arrival at their new home; that there was a store a short distance from the house he had rented. Libellee, on the other hand, testified that her husband told her to go to the home of her parents who lived at Makawao, and that she went there and took the children and household furniture; she denied that her husband gave her any money when she left Kahului, and testified that she was absolutely without money. In support of his testimony that he had rented a house at Makawao libellant introduced, and there was received in evidence, a receipt showing that libellant had rented and paid rent for a house from February 18, to March 18, 1914. Other than this there was no evidence to corroborate the testimony of either party as to where libellant expected his wife and children to go when they left Kahului for Makawao. There were no findings of fact made by the lower court, but on this point, as to where the libellant told his wife to go and whether or not he supplied her with money at that time, the evidence is conflicting and we must assume that the circuit judge believed the testimony of the libellant and disbelieved the testimony of the libellee. Be that as it may, it appears from the undisputed evidence that within a day or two after the wife left Kahului (the libellant testified, on the day following her departure), libellant went to Makawao and found his wife and children, with the furniture, at the home of the wife's parents. He testified that he then asked her to go and live with him and she refused. In this he is corroborated by the witness David Morton, deputy sheriff of the Makawao district, who was called in when some dispute arose between the parties as to the husband's taking the furniture. Morton testified that he urged

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the wife to go back to Manuel and she said she did not feel like going with him any more; that he was never steady in one place; that this was the only reason that she gave. Morton further testified that libellant had a wagon and that he took the furniture away with him. Libellant testified that he went to see his wife the next morning and again asked her to live with him and she again refused; that she would not live with him in the house he had rented or anywhere; that she said she would go nowhere from her father's house; that he sold the furniture the day after he took it away, and after staying in Makawao for a week or ten days he went to Honolulu where he had since resided, living in the home of his married brother; that his brother and sister-in-law had no children of their own and that his sister-in-law was willing to help him take care of the children in case their custody was awarded to him; that after going to Honolulu he wrote his wife several letters asking her to live with him but received no reply to any of his letters; that he sent no money in any of the letters to pay the passage of his wife and children from Maui to Honolulu. There was testimony from several other witnesses, mutual friends of the parties, who were trying to get the wife to return to her husband, that libellee at various times said she would not live with her husband. A. R. Souza, Jr., testified that in July, 1915, at the request of the husband, he saw Mrs. Costa and tried to get her to go back to her husband but she said, "If I ever do that my father would not accept me any more in his house;" that he saw her a week later and she told him she had met her husband at Mrs. Abreu's house and would not go back with him; that some time in September, 1915, libellee told him she would not go back to her husband because if she did her father would not think of her again. A. F. Tavares testified to the same effect, that shortly after the separation he went to the house of libellant's parents to see her and

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asked her if she would not go back to her husband; that she studied for a long time and finally she refused and went right into the house again. We think the evidence warranted the circuit judge in holding that libellee left her husband without just cause and against his will. The desertion was therefore wilful and the only question is whether it was justified by the fact that at the time libellee went to the home of her parents she was pregnant. This fact was testified to by libellee herself and also her father, it appearing that some three months after going to her parents' home she gave birth to a child, which died a few weeks later. It appears from the evidence that libellant did not write his wife for several months after going to Honolulu, and that the father of libellee, who is fairly well-to-do, has taken care of libellee and the children since they came to his house and that he paid all the expenses incident to the birth of the child.

We gather from a reading of the entire transcript that the relations between libellant and his wife's parents are unfriendly and libellee's preference seems to be to remain with her parents rather than live with her husband, of whom she complains that he is not steady—that he does not remain long in one place. Libellee never gave as a reason for leaving her husband the fact of her pregnancy, nor does it appear that she has at any time, by letter or otherwise, requested libellant to receive her back or contribute to the support of herself and children. She seems to have been perfectly satisfied with the situation in which she found herself after deserting her husband and to have preferred to remain with her parents, who, it appears, are taking care of her and the children. Libellee at the trial, when asked if she was willing to go to her husband, if he then had a home for her, testified: "I was willing." "Q. Are you willing to go to him now? A. Well, he said he wanted a divorce. The Court: You answer the question.

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A. I think we might as well have a divorce same as he likes." She has made no effort to effect a reconciliation, and in this attitude she seems to have the support of her parents. No just cause having been made to appear for her leaving her husband in the first instance, even though it be true that in 1915, some three or four months before Christmas, as testified to by her and Mrs. Abreu, libellee talked with her husband and offered to live with him if he would provide a home for her in Honolulu, we are of the opinion that this offer to return, if made, after her previous repeated refusals to live with her husband, was made too late, her desertion at that time having continued for more than one year and her husband having acquired a right to a divorce. 9 Am. & Eng. Ency. Law (2d ed.) 775; 14 Cyc. 620; 1 Bishop M. & D. (6th ed.) §810.

While we may think, as men, that the libellant's treatment of libellee, subsequent to her leaving him, was harsh and unmanly, in that he did not go to see her or write her at the time of her confinement, and while it unquestionably appears that his conduct towards her does not evince such an affection for her as a husband should have for his wife, we are of the opinion that libellee left her husband without just cause and that upon her remaining away from him and refusing to live with him for more than one year libellant became entitled to a divorce upon the ground of the wife's desertion.

The decree appealed from is affirmed.

C. H. McBride for libellant.

E. Vincent for libellee.

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TERRITORY v. HONOLULU RAPID TRANSIT &
LAND CO.

No. 909.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED JUNE 19, 20, 21, 1916.

DECIDED JULY 24, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—construction—*noscitur a sociis*.

The rule *noscitur a sociis* does not apply in the construction of a statute where specific words are used which are not relatives of the same genus. There neither word derives color from association with the others, but each stands as the representative of a distinct class.

SAME—legislative intent—conditions and circumstances existing at time of enactment.

In ascertaining the meaning of a statute which requires construction the court should consider the language used in connection with the conditions and circumstances existing at the time of its enactment.

SAME—contemporaneous construction by executive officers.

A uniform practical construction given to a statute by executive officers of the government who have duties under the act, though not controlling, is, in case of doubt, entitled to much weight, especially where rights of parties have been adjusted in accordance with it.

WORDS AND PHRASES—“actual cost.”

The term “actual cost” means money actually paid out, or “real cost.” It may be considered as synonymous with “expense” and as excluding all profit.

STREET RAILROADS—Honolulu Rapid Transit & Land Co.—powers under franchise act.

The Honolulu Rapid Transit & Land Co. has power under sections 17 and 37 of the franchise act (S. L. 1898, Act 69; R. L. 1915, Secs. 784, 804) to expend so much of its income as it may desire in making extensions in and to its line of road; and to

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increase its capital stock to an amount equal to the actual cost of its property, including income expended therein (except such as might otherwise be payable to the Territory as its share of excess income over 8% in any one year) and money borrowed upon bond issues, plus 25% in addition to such cost.

OPINION OF THE COURT BY ROBERTSON, C.J.

The Territory, in a suit for an injunction to restrain the Honolulu Rapid Transit & Land Company from carrying out an alleged plan to increase its capital stock, averred that it is provided by the charter and franchise of the company that it shall not be lawful to increase the capital stock of the company in excess of the sum of \$200,000 unless the proposed increase shall, when taken with the original capital stock (\$200,000) represent only the actual cost of the property of the railway (company) and not over 25% of such cost in addition thereto; that the amount of its capital stock now outstanding is of the par value of \$1,207,500, and that it exceeds the actual cost of the property of the railway and 25% of such cost in addition thereto. By an amendment to the bill, however, it was averred that neither the actual cost nor the actual value of the property exceeds the sum of \$966,000. The sum of \$966,000 plus 25% amounts to \$1,207,500, the present outstanding capital of the company. The bill further averred that the company plans and intends to and will, unless restrained, further increase its capital stock to the sum of \$1,600,000, which would far exceed the actual cost of its property and 25% of said cost in addition thereto. The company, in its answer, denied that the amount of its present capital stock exceeds the actual cost of its property and 25% in addition thereto, and averred that the actual cost of its property exceeds the sum of \$2,171,841.51. It was also averred in the answer that though neither the directors nor the stockholders of the company have taken any action looking to

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the increase of the capital stock, the company has a just and legal right to increase the same to the sum of \$1,600,000, and that it may do so at any time unless restrained by order of court. Aside from the point whether the company planned and intended, unless restrained, to increase its stock to \$1,600,000 or merely claimed the right to do so at any time, the only issue raised by the pleadings was as to the amount of the capital stock which the company is authorized to issue based upon actual cost of its property. At the hearing, however, the complainant conceded that of the items aggregating the sum of \$2,171,976.11, which the company submitted as capital expenditures representing the original cost of the property, items to the amount of \$1,603,056.68 were correctly stated. Nevertheless a great mass of testimony was offered and admitted as to the actual present value of the company's property. The complainant advanced the contention that the company could issue stock only upon the value of its plant after deducting depreciation. In other words, that the alleged proposed increase of stock could not legally be made unless it represented actual existing value. The circuit judge, in his decision, after referring to some of the testimony as to the value of the property, and the stipulation of the complainant as to its actual cost, but without making any express findings as to the actual value or the exact cost of the property, held that the right of the company to increase its capital stock turned upon the actual cost and not upon its present value; that by its franchise and charter the company is authorized to issue stock to the actual cost of its property and 25% in addition thereto; and that under any view that may be taken of the evidence (as to either cost or value) the company has the right to issue stock to the amount of \$1,600,000. A decree dismissing the bill was entered, and from that decree the Territory has appealed.

We have found some difficulty in ascertaining which, if

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any, of the several questions discussed in the appellant's brief are properly before this court for consideration and determination. The following are the errors specified in the brief of the attorney general as having been committed by the circuit judge: (1) "In holding that the respondent may lawfully increase its capital stock to the actual cost of the property of the railway and twenty-five per cent. of such cost in addition thereto." The complainant's bill avers, however, as above stated, that the company's charter and franchise provides that it shall not be lawful for the company to increase its capital stock in excess of \$200,000 unless the proposed increase, when taken with that sum, shall represent only the actual cost of the property and not over 25% of such cost in addition thereto. And the bill was evidently drawn upon the theory and understanding that the company has the right to increase its stock to a sum which will equal the actual cost of its property plus 25% thereof. Furthermore, any question as to the additional 25% over and above actual cost would seem to be of no practicality since the complainant has admitted that the "original cost," which we take to mean "actual cost," of the property was \$1,603,056.68, the only right claimed by the company being to increase its capital to the sum of \$1,600,000. (2 and 3) "In holding that paid up capital stock may be issued *pro rata* to stockholders without consideration of the amount of the cost of the property of the railway paid for by the proceeds from the sale of bonds" or "paid for by surplus earnings and to the full extent of such earnings." A careful reading of the decision of the circuit judge fails to show that he so held. (4 and 5) "In holding that the actual cash value of the property of the railway at the time the above entitled cause was commenced against which capital stock might be issued was \$2,139,710" and that "the cost of the property of the railway against which capital stock might be issued was \$2,171,976.11."

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The circuit judge made no such findings. As above stated, he made no specific finding as to either the actual value of the property or its exact cost, but only a general finding that upon the basis of either value or cost as shown by the evidence an increase of the capital stock to \$1,600,000 would be authorized. The remaining specifications of error (6 and 7) are general ones as to refusing to grant the injunction and in dismissing the bill. Were this a writ of error the last two specifications would be too general as assignments of error to require consideration. But as this is a general appeal intended to bring the case up for review upon the whole record (R. L. 1915, Sec. 2509) we feel disposed to consider some of the questions which have been argued notwithstanding the failure of the appellant's brief to specify them as errors under Rule 3 of this court. The material facts are not disputed, the questions raised being questions of law. The views of counsel for the complainant seem to have developed considerably since the bill was filed.

The Honolulu Rapid Transit & Land Company was incorporated under a charter which authorized it to construct a street railway in such streets, roads and places in Honolulu as are designated in Act 69 of the Session Laws of 1898, of the Republic of Hawaii (R. L. 1915, Chap. 54) and to operate the same under and in accordance with the authority of said act. The capital stock of the company was designated to be \$200,000 with the right to increase the same from time to time upon notice to the minister of interior (superintendent of public works) by the issue of new shares not to exceed in all \$2,000,000, provided that whenever such increase is made for the purpose of constructing new lines or branches of its railway, and of equipping the same, or for covering extensions already made, the notice of the increase shall be accompanied by a sworn certificate of the company showing the estimated or actual cost of such proposed extension or of such extension already

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made, and that not more than 25% of such cost has been added. Section 17 of the franchise act (R. L. 1915, Sec. 784) provides as follows:

"The following charges shall be lawful upon the income of said railway:

"1. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway;

"2. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued;

"3. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise; provided, however, that the amount placed to the credit of such sinking fund annually shall not exceed in amount such a sum, with interest computed at five per cent. per annum, compounded, as will, principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid;

"4. The excess of income shall be divided equally between the Territory of Hawaii and the stockholders of said corporation;

"5. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the superintendent of public works from the beginning of the actual construction of the railway."

It is now contended by the complainant that notwithstanding its admission at the hearing that the actual cost of the property of the company was \$1,603,056.68, that was not the actual cost to the company, and that the actual cost mentioned in section 37 of the franchise act (R. L. 1915, Sec. 804), which will be dealt with presently, means actual cost to the company. It is argued that the "extensions," for the expense of which the income of the railway may be used under paragraph 1 of section 17, under the rule of construction *noscitur a sociis*, must be held to be limited to such extensions of the lines of the railway as are

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proper or necessary to the maintenance and operation of the railway, whereas it has not been shown as to certain of the extensions made by the company that they were so proper and necessary. Assuming the fact to be as contended, we cannot sustain the argument. The language of the paragraph referred to is "every other cost and charge properly or necessarily *connected with* the maintenance and operation of said railway," and the contention made does not go as far as to assert that the extensions in question are not properly or necessarily connected with the maintenance and operation of the road. The view taken by counsel is that the general words of the paragraph qualify the preceding specific words. An equally tenable view would be that the scope of the general words is enlarged by the specific words. See *People v. Bridges*, 142 Ill. 30, 37. In the case of *Moir v. Knell*, 17 Haw. 135, 139, this court quoted Broom's Legal Maxims, 591 (*455) as follows: "In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied, the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter." Under the *ejusdem generis* rule the specific words qualify the general phrase. *Territory v. Hamakua Mill Co.*, ante p. 1. But the words "operating, repairs, renewals, extensions, interest," are not in fact *ejusdem generis*—are not of one genus, and it is held that where the specific words used in the statute are not related neither derives color from association with the others, but each stands as the representative of a distinct class, and neither the *ejusdem generis* rule nor that of *noscitur a sociis* applies. *State v. Eckhardt*, 232 Mo. 49, 53; *McReynolds v. People*, 230 Ill. 623, 633; *Sheely v. People*, 54 Colo. 136. We hold that the company acted within its rights under the stat-

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ute in using its income in the making of the extensions in and to its line of road.

The remaining points urged on behalf of the complainant, and which we will discuss, involve the meaning and effect of section 37 (R. L. 1915, Sec. 804) of the franchise act. It reads as follows:

"It shall not be lawful to increase the capital stock of said corporation at any time in excess of said two hundred thousand dollars, unless the proposed increase shall, when taken with the said original capital stock, represent only the actual cost of the property of the railway, and not over twenty-five per cent. of such cost in addition thereto; such cost may include all expense, of laying tracks and equipping the road for public use, and may also include all subsequent extensions, but no such increase shall be authorized for extensions until they shall be determined upon and authorized by a vote of the corporation."

The attorney general, in his brief, says, "Under no rule of statutory construction can this provision be construed as meaning that the company may issue stock that has not been paid for. We contend that this limitation does not give the company the right to issue stock to its shareholders without consideration." The phraseology of the section in question that the capital stock of the company shall not be increased "unless the proposed increase shall, when taken with the said original capital stock, represent only the actual cost of the property of the railway, and not over twenty-five per cent. of such cost in addition thereto" implies that such 25% additional shall not represent value. It was evidently intended to allow a bonus which, taken in connection with the provisions of section 17, would amount to an allowance of ten per cent. of dividends upon stock which has been issued upon capital cost before the government would be entitled to share in an excess of profits. The reason for this provision and the liberal provisions of section 17 is to be found in the conditions which existed when the

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franchise act was passed and the circumstances under which it was enacted. The intention of the legislature is to be ascertained from the words used in the statute "interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the government at the time it acted on the subject." *Dewey v. United States*, 178 U. S. 510, 520. "The court may with propriety, where the language of the statute appears to be ambiguous or the meaning doubtful, put itself so far as possible in the light that the lawmakers enjoyed, and view the situation as it appeared to them, and thereby ascertain and discover the purpose and intendment of the enactment from the language employed, in connection with the attending conditions and circumstances, including the history of the times." *Northern Com. Co. v. United States*, 217 Fed. 33, 35. At the time of the passage of this franchise act the principal streets of Honolulu were occupied by a street railway operated by a foreign corporation, the Hawaiian Tramways Company, under a franchise granted by chapter 34 of the Session Laws of 1884, as subsequently reenacted and amended. The service given by that company was notoriously inefficient and inadequate and unsatisfactory to the public. The rates of fare charged by it were high. There was a demand for a better and cheaper service but the company failed to respond to public opinion. Its cars were drawn by horses and mules, and ran upon an undependable schedule. The company claimed that it had an exclusive franchise, and whether or not it possessed such in law it did have such in fact as to such streets as were not wide enough to accommodate two lines of railway. The legislature must have foreseen that an opposition company, if organized, would soon face expensive and protracted litigation, and that such a company, in order to instal a feasible and adequate

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system, would be compelled sooner or later to buy out the existing concern, perhaps at its own terms. Whether an electric road limited to a reasonable rate of fare could be profitably operated was one important question, and another, depending on that, was whether capital could be induced to venture into the enterprise. Here, then, in brief, are some of the circumstances under which the legislature enacted this act, and which go to explain why the seemingly very favorable terms were granted. It was doubtless the purpose of the legislature to, if possible, rid Honolulu of an unsatisfactory and undesirable railway system and open the way for an efficient modern car service. We hold that the theory upon which the bill of complaint in this case evidently was drawn was the correct one, and that the company was entitled, upon increasing its capital stock, to issue to its shareholders, in addition to shares of a par value equal to the amount of the actual cost of its property, shares not exceeding the face value of 25% of such cost, by way of a bonus to encourage the investment of capital in the venture. There is no question here as to the rights of creditors.

Next, it is contended that the words "actual cost" used in section 37 of the franchise act mean actual cost to the company or its stockholders, and should be held not to include cost of property paid for out of moneys borrowed upon bond issues or the investment upon capital account of any surplus income in excess of eight per cent. in any one year which might have been payable to the Territory under the provisions of section 17. And it is argued that even though it should be held that all the net income of the company may be put into extensions, still so much of such income as would otherwise have been payable to the Territory if not so invested ought not to be allowed to be capitalized since to that extent the expense of extensions cannot be said to have been at the cost of the company or its

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stockholders. On behalf of the company it is urged that the statute authorizes a capitalization based upon the actual cost of the company's property wholly irrespective of the source from whence the money to defray the expense may have been derived. The complainant invokes the well established rule that grants of public franchises are always construed strictly in favor of the public and against the grantee. 10 Cyc. 1088. The company invokes the rule as to contemporaneous practical construction, saying, in its brief, "The uniform construction of every department of the government charged with passing upon the matter has been that stock can be issued for the actual cost of the road; that is to say, all expenditures, from whatever source derived, plus twenty-five per cent." The evidence sustains this contention so far as the executive branch of the government is concerned. It was clearly the duty of the executive officers to have objected to, protested against and refused to acquiesce in the acts done by the company if they had deemed them illegal. We cannot presume that they were derelict in duty in the premises. But we are unable to find that there has been a legislative construction of the disputed questions. The evidence shows that statements have regularly been rendered by the company to the superintendent of public works as required by paragraph 5 of section 17 of the act; that the required notices have been duly given to the treasurer of the Territory when the capital stock has been increased; that no protest or objection has been made by either officer to the course pursued by the company or its assumption that it had the legal right to pursue the course taken; that from time to time the affairs of the company have been examined into and scrutinized by legislative committees; that both the executive and legislative branches of the government have kept posted from the start as to the manner in which the company's business has been conducted and as to the

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method pursued by it in regard to the issuance of stock. And though the manner in which the company handled the transaction whereby it bought out the Hawaiian Tramways Company was criticized, the right of the company to capitalize the cost of other property paid for with money obtained by the sale of bonds, or its right to capitalize income expended on extensions, or its right to issue stock up to 25% above the cost of property under section 37, seems not to have been questioned. Upon the theory that the Territory was not likely ever to share in the surplus income of the company under paragraph 4 of section 17 of the franchise act a statute was passed at the session of 1905 (S. L. 1905, Act 88; R. L. 1915, Section 1241) with a view evidently to obtain more from the company in the way of taxes upon its property. See *Rapid Transit Co. v. Assessor*, 18 Haw. 15. Stress is laid by counsel for the company upon the fact that the legislature at its 1913 session passed an act (S. L. 1913, Act 136) amendatory of the act of 1898 which authorized the company to increase its capital stock as of January 1, 1913, to \$1,600,000, and at the same time recognized the outstanding bond issue of \$599,000. That act, by its terms, required the approval of the Congress of the United States within two years, but the approval was not given. That act, as we understand it, represented a compromise between the views of the territorial executive and those of the company as to the terms upon which an extension of the term of the company's franchise could properly be granted, and the fixing of the amount of the capital stock at the sum of \$1,600,000 was a result of such compromise. Some significance may properly be attached, however, to the fact that the word "extensions" was proposed to be eliminated from paragraph 1 of section 17 of the existing act, and the matter of extensions made the subject of a separate paragraph. It is also interesting to note, in connection with the present dispute in regard to the company's

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capitalization, the phraseology proposed by way of amendment to section 37, as follows: "No stock in excess of said amount shall be issued by said corporation in consequence of or to represent any increase in the value of its property or any earnings, donations, *proceeds of bonds* or other income expended or *invested in extensions* or improvements of or additions to its property or upon any consideration *except the direct payment of at least par value thereof to said corporation in cash* and with the approval of the commission" etc. But all this falls short, we think, of an actual construction by the legislature of the original franchise act in accordance with the claims of the company. The practical construction accorded by the executive officers having authority with respect to the company's affairs is entitled to weight. 36 Cyc. 1140; *Macfarlane v. Collector*, 11 Haw. 166. "The regulation of a department of the government is not of course to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons." *Robertson v. Downing*, 127 U. S. 607, 613. See also *Fairbank v. United States*, 181 U. S. 283, 308. In the case of *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, 479, the court said that "when for a considerable time a statute notoriously has received a construction in practise from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed. * * * Even apart from the reenactment a certain weight attaches to this fact."

The doubt as to the meaning of the provisions of section 37 of the franchise act arises primarily out of the fact that under section 17 the Territory is entitled to share in the

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excess income over 8%, and counsel for the appellant point out with much force that if the contentions of the company should be upheld there would be no probability of the Territory ever obtaining any such revenue. The reply of the company is to the effect that the legislature never expected that the government would ever receive any direct revenue out of the enterprise, and that the only object in incorporating the provision of paragraph 4 of section 17 was to encourage the extension of the system and insure, if possible, the maintenance of a good service. The question turns largely upon the meaning of the term "actual cost" as used in section 37. Webster's Dictionary defines the word "cost" as "The amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or service rendered." See *McCoy v. Hastings*, 92 Ia. 585. "'Cost' may be considered as synonymous with 'expense.'" *Hygienic Chemical Co. v. Provident Chemical Co.*, 176 Fed. 525, 528. Under this definition borrowed money expended on property would be included in computing the cost of the property. "Actual cost" means money actually paid out. *Lexington etc. R. Co. v. Fitchburg R. Co.*, 9 Gray 226, 230. Or "real cost." *Newton, Petitioner*, 172 Mass. 5, 10. And excludes all profit. *Raisler Heating Co. v. Dowd*, 102 N. Y. S. 504. In the case of *In re Old Colony Railroad*, 185 Mass. 160, a statute relating to the abolition of certain grade crossings provided that the State should "repay to said railroad company forty-five per cent. of the cost incurred by said company in carrying out said alterations and improvements." The company claimed the right to include interest on borrowed money. That claim was not allowed, but the court assumed that the amount of borrowed money could properly be included, saying (p. 163), "The cost incurred by the company, and for which it is to be finally repaid, are the necessary disbursements required to make the alterations or-

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dered by the commissioners; and to meet this expense, it may pay from funds in its treasury, or issue and sell its stock, or it might go into the market, and hire what was necessary on its negotiable paper." In *State ex rel. Bridge Co. v. Mayor*, 49 Mo. 401, under ordinances authorizing and requiring the city of St. Joseph to issue city bonds to and to subscribe for a certain amount of stock in a bridge company when and as certain sums had been actually expended by the bridge company in the construction of a bridge across the Missouri river, the mayor refused to issue the last instalment of bonds called for on the ground that it did not appear that the sum expended by the company was derived from other sources than the sale of city bonds as contemplated in the first ordinance. The court, after calling attention to the contemporaneous construction placed upon the ordinance by the parties themselves held that "when the plaintiff made its proof as required, that it had expended the necessary sum, although it did not appear that it was derived from a source other than the sale of the city bonds, then the mayor should have delivered the additional bonds demanded."

The claims advanced by the company which go to the extent of almost nullifying paragraph 4 of section 17 of the act as a possible source of revenue to the Territory might be difficult to sustain as against the rule of strict construction against the grantee of a franchise were it not for the contemporaneous construction given to the act by the executive officers. Taking the provisions of the statute as we find them and applying the two rules of construction referred to, balancing one against the other, we think, upon the whole, that the contention of the appellant that the term "actual cost" used in section 37 means cost to the company should be sustained so far as the investment of income is concerned, but not as to borrowed money. Under the view we take of the matter the company was entitled

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to expend as much of its income as it desired for the purposes enumerated in paragraph 1 of section 17, but that it could not all be capitalized as cost under section 37. We hold that the actual cost of the company's property does not include any money expended upon property which money would otherwise have been payable to the Territory as its share of excess profits over 8% in any one year under section 17. As such money could never have reached the stockholders of the company it cannot be said that it was expended at their cost. And if the contemporaneous construction can be said to have extended to a contrary view on this point it was so clearly wrong that it ought not to be followed. On the other hand, we hold that borrowed money invested in property may properly be included in computing the actual cost of the property to the company and, therefore, may be capitalized under section 37. Whether the bonds will eventually be redeemed with money that would otherwise have gone to the stockholders as income within the rate of 8% a year, or with such as would have been divided equally between the Territory and the stockholders as net income in excess of 8%, were it not for the provision for a sinking fund, is a thing that cannot be determined until the bonds shall be taken up. In this connection it should be noted that the right to provide a sinking fund for the redemption of bonds has precedence under section 17 of the act to the right of the Territory to share in the excess income.

On behalf of the appellant it is contended that under general corporation law shares of stock may not be issued except upon payment of the par value thereof, or, when issued by way of a stock dividend to shareholders, only in case property equivalent in value to the full par value thereof has been accumulated and added to the capital assets of the corporation; also that under the law applicable to public utility companies as established in "rate" cases the

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stockholders are entitled to only a reasonable return on their investment. And it is urged that under either or both of these principles this company is not entitled to increase its capital stock because the actual value of its existing property does not warrant it, and because the stockholders may now receive full and reasonable returns on the capital invested. The writer is of the opinion that assuming the contentions to be correct in point of law, the conclusion cannot be adopted, even though the facts may be as stated. It seems clear that the contentions have no application in the case at bar. Here, the rights of the company with respect to the issuance of stock are set forth in the franchise act. Whatever may be the rule applicable to corporations under the general law or under public utility statutes, this company's rights in the premises are defined by the special act under which it operates. A corporation being a creature of statute, its powers are determined by the statute under which it was organized. *Head v. Providence Ins. Co.*, 2 Cranch 127, 167; *Oregon R. Co. v. Oregonian R. Co.*, 130 U. S. 1, 20; *Royal Arcanum v. Green*, 237 U. S. 531, 543. A corporation may be authorized by a special statute to do something which other corporations operating under a general statute may have no power to do. In such case the special provision is regarded as an exception to or repeal of the general law as to the particular corporation. 4 Thompson on Corp. Sec. 5678; *Jones v. Railroad*, 67 N. H. 234, 238. The Honolulu Rapid Transit & Land Company was incorporated for the purpose of exercising the franchise granted by Act 69 of the Session Laws of 1898, and possesses all the powers conferred by that act. Section 37 authorized the issuance of capital stock equal to the amount of the actual cost of the property of the company and not over 25% of such cost in addition thereto. The meaning of the term "actual cost" having been ascertained there is no further doubt as to the meaning of the pro-

Watson, J., concurring.

vision. The intent is plain and there is no room for construction. The question as to the present value of the company's property does not affect the company's right to increase its capital stock.

As to the matter of the cost of the company's property we find that, after leaving out of consideration certain disputed items as to which there may perhaps be some doubt, there should be added to the sum of \$1,603,056.68, admitted by the complainant to have been actually and properly expended, the items of \$255,549.94, purchase of Hawaiian Tramways Company, and \$79,024.43, Pearl Harbor Traction, making a total of \$1,937,631.05. And we hold that the actual cost of the property of the company was not less than that sum, except that there should be deducted the amount of excess profits, if any, invested in property which would otherwise have been payable to the Territory under section 17 of the act as hereinabove stated. This conclusion does not change the ultimate result arrived at by the circuit judge in dismissing the bill. The decree appealed from will therefore be affirmed.

There were other and subordinate questions discussed in the briefs and argument which we deem it unnecessary to comment upon.

I. M. Stainback, Attorney General, *W. H. Heen*, Deputy Attorney General, and *W. T. Carden*, Second Deputy City and County Attorney, for complainant.

W. F. Frear and *D. L. Withington* (*Frear, Prosser, Anderson & Marx* and *Castle & Withington* on the brief) for defendant.

CONCURRING OPINION OF WATSON, J.

I concur in the conclusion that the decree of the lower court should be affirmed. I also concur in so much of the reasoning contained in the opinion of the chief justice as is

Watson, J., concurring.

germane to what I conceive to be the sole issue involved, i. e., the right of the company to increase its capital stock to the sum of \$1,600,000. I agree that the rule *noscitur a sociis* should not be applied in construing the word "extensions" as used in paragraph 1 of section 17 of the franchise act, and that the company had the right under the statute to use its income in the making of the extensions in and to its line of road; that the proceeds of bonds invested in property may properly be included in computing the actual cost of the property to the company, and may be capitalized under section 37 of the act; and that the company has not the right to capitalize excess income invested in property, which excess income would otherwise have been payable to the Territory under the provisions of paragraph 4 of section 17 of the act. It is made plain by the provisions of section 37 of the act (which section is quoted at length in the principal opinion)—and this was the view taken by the circuit judge—that the right of the company to increase its capital stock is dependent, not upon the present value of the property of the company but upon the actual cost of such property. The circuit judge, without making any specific finding as to the actual cost of the company's property, held generally that upon the showing made such cost was more than sufficient to authorize the company, under the terms of the franchise act and of its charter, to increase its capital stock to \$1,600,000, and thereupon a decree was entered dismissing complainant's bill and dissolving the temporary injunction theretofore issued. Holding, as we do, that the cost of the property was not less than \$1,937,631.05, and accepting as correct the figures contained in the reply brief of counsel for the appellant showing that on April 30, 1915, the date of the filing of the bill, the amount of excess profits invested, to which the Territory would otherwise have been entitled under section 17 of the franchise act, amounted to \$278,131.95, it is obvious that, deducting this last men-

Watson, J., concurring.

tioned amount from the total cost, the actual cost of the company's property which it may rightfully capitalize amounts to more than \$1,600,000; and this without taking into consideration the provisions of section 37 of the franchise act which would seem to authorize the issuance of capital stock to the amount of the actual cost of the property of the company and not over twenty-five per cent. of such cost in addition thereto.

When complainant stipulated in the court below that of the items aggregating \$2,171,976.11, submitted by the company as capital expenditures representing the original cost of the property, items to the extent of \$1,603,056.68 were correctly stated, I am of the opinion that upon the issue raised by the pleadings the complainant was virtually out of court.

The contention of the attorney general in his brief and oral argument that the company has not the right to issue stock to its shareholders without consideration raises a point which is wholly without the case made by the pleadings and one that was not considered or passed upon by the lower court. The rights of creditors are not involved in this proceeding (*Handley v. Stutz*, 139 U. S. 417; *Christenson v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429). The sole issue made by the pleadings is as to the right of the company to increase its capital stock, and this was the only question passed on by the circuit judge. At this time to permit complainant to interject into the case an entirely new issue *as to what disposition the company may lawfully make of its shares, even if it has the right to increase its capital stock and issue them*, is, as I view it, wholly inappropriate, not warranted by the pleadings, and should not be permitted. This court should not decide a moot question where it is apparent that the object of the parties is not the vindication of a right, but a desire to obtain an interpretation of a statute. *Sennette v. Police Judge*, 129 La. 728, 56 So. 653.

Quarles, J., concurring.

If the company has the right to increase its capital stock, the disposition of the shares after such increase would in no wise affect complainant's right to the injunctive relief sought by the bill. In my opinion the question is not open for consideration in this case. *National Bank v. Commonwealth*, 9 Wall. 353; *Harding v. Giddings*, 73 Fed. 335, 341; *Stevenson v. Henkle*, 100 Va. 591, 42 S. E. 672; *Union Bank v. City of Richmond*, 94 Va. 316; 26 S. E. 821. To consider and determine this question would, in my opinion, as was said by the supreme court in *Supervisors v. Lackawana Iron and Coal Co.*, 93 U. S. 619, 624, "involve the exercise on our part of original instead of appellate jurisdiction. This is not permitted to us." "The supreme court of this Territory is primarily a court of appeal and has such original jurisdiction only as has been expressly, or by necessary implication, conferred upon it by law." *In re Pringle*, 22 Haw. 589.

In my opinion, under the stipulation entered into by the parties as to the cost of the property of the company, and under all the evidence in the case, the decree of the lower court should be affirmed.

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion that the decree denying the injunction sought be affirmed on the ground that the proven facts show that the defendant corporation's property exceeds in cost the amount to which it proposes to increase its capital stock in the aggregate. Many questions entirely without the issues made by the pleadings have been discussed in the briefs and oral arguments and to some extent in the principal opinion. The issues made by the pleadings raise only one question, i. e., whether under the facts the defendant has the power under the franchise act and its articles of incorporation under which it operates, and

Quarles, J., concurring.

under the general incorporation laws of the Territory, to increase its aggregate capital stock to \$1,600,000. A written stipulation was filed wherein it appears by agreement of both parties to this suit that the cost of the defendant's properties exceeds the sum named. The injunction sought was demanded upon the sole ground that the proposed issue of stock would increase the capital stock of the defendant to an amount in excess of the cost of its properties in violation of section 37 of the said franchise act, and on this issue the evidence and admitted facts are against the contention of the Territory.

To my mind the provisions of sections 17 and 37 of the franchise act, which sections are quoted in the principal opinion, are plain and free from ambiguity and call for no construction by extrinsic aid or otherwise. The phrase in said section 37 "increase its capital stock" means just what those words import in their usual and ordinary signification and said section does not authorize the defendant to water its stock or to issue stock dividends except in the manner authorized by section 3299 R. L. The words "right" and "power" mean different things. It is only a question of power that is involved here. The right of the defendant to issue some of the stock heretofore issued by it and to issue further stock, and the disposition of such stock as well as the amount of excess income heretofore earned by the defendant, to which the Territory is entitled, are matters to be settled in some other suit or suits and are not involved in the issues now before this court.

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Syllabus.

TERRITORY v. HILO MERCANTILE COMPANY,
LIMITED, A CORPORATION.

No. 937.

ERROR TO DISTRICT MAGISTRATE OF SOUTH HILO.

SUBMITTED JULY 22, 1916.

DECIDED JULY 27, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*criminal procedure—remanding cause for further proceedings.*

When the trial court sustains a demurrer to a criminal charge, discharging the defendant from custody, and on writ of error the order sustaining the demurrer is reversed, the cause will be remanded to the trial court for further proceedings.

OPINION OF THE COURT BY QUARLES, J.

The defendant, a domestic corporation, was, by penal summons, commanded to appear before the district magistrate of South Hilo and answer to the charge of keeping and storing more than 110 gallons of kerosene in a certain building situate in Hilo, said building not being a building or warehouse used exclusively for the storage of explosives, contrary to the provisions of section 700 R. L. To the said charge the defendant appeared and demurred upon the ground that the charge did not constitute a violation of the laws of the Territory, more particularly, in that it does not allege that the kerosene stored in the said building gives off an inflammatory vapor at a temperature of 115 degrees or less. The district magistrate sustained the said demurrer and made an order discharging the defendant. To review the action of the district magistrate, the Territory under the provisions of section 2520 R. L. has sued out a writ of error. The plaintiff in error has assigned one and only one error, to wit: "That the district magistrate erred in sustain-

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ing the demurrer of the defendant to the charge in said cause."

The defendant in this court has filed a confession of error, and as we are of the opinion that the said charge constituted an offense under section 700 R. L., construed in connection with 701 R. L., we have concluded that the order of the district court sustaining the demurrer should be reversed.

A question of practice has arisen as to the proper mandate to be issued from this court to the district court. We are of the opinion that section 2520 and other provisions in chapter 142 R. L. were intended to authorize further proceedings in cases like the one before us. It will be noted that the statute authorizes a writ of error by the Territory from orders or decisions based upon the invalidity or construction of the statute upon which the indictment or charge is founded and whereby the indictment, or some count thereof, or charge, is quashed, or a demurrer thereto sustained, or the judgment of conviction is arrested; and from a decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy. We are of the opinion that it was intended by this statute and other provisions in chapter 142 R. L. relating to writs of error to authorize the remanding of a criminal cause like the one at bar where a demurrer based upon the construction of the statute upon which the charge is founded has been sustained and the order sustaining such demurrer is reversed for further proceedings in the court below. Otherwise the legislature would not have confined the review to cases where the defendant has not been put in jeopardy. If the object of the statute authorizing the writ of error was merely to settle questions of practice, the legislature, presumably, would have said so, thus exempting the case at bar from the operation of the provisions of section 2534 R. L. wherein it is provided that "the supreme court

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shall have power to enter such judgment in the case as in their opinion the facts and law warrant."

The law requires the plaintiff in error to assign the errors relied upon for a reversal and appellate courts generally confine their review to the errors assigned. The order made by the district magistrate discharging the defendant is clearly erroneous, and if the plaintiff in error had assigned the making of such order as error we would have been constrained to reverse that order also; but, in the state of the record before us, we cannot do so without going outside of the assigned errors. Upon the return of this cause to the district court the district magistrate has authority to set the order discharging the defendant aside, the same being based upon an erroneous ruling sustaining the demurrer, thus leaving the case in the same condition as if the demurrer had been overruled. If this course is pursued the defendant must be given an opportunity to plead to the charge. We merely suggest the power of the court below in the premises.

The order sustaining the demurrer is reversed and the cause remanded to the district court for further proceedings not inconsistent with the views herein expressed.

W. H. Heen, Deputy Attorney General, for plaintiff in error.

H. Irwin for defendant in error.

Syllabus.

MARIA JESUS FARIAS v. ELESERIO M. FARIAS, ANTONIO FARIAS, DANIEL FARIAS, ROSA FARIAS, AND ADELAIDE FARIAS, ALL MINORS, BY THE GUARDIAN OF THEIR PERSONS AND ESTATE, E. G. DA SILVA; E. G. DA SILVA, GUARDIAN OF THE PERSONS AND ESTATE OF SAID ELESERIO M. FARIAS, ANTONIO FARIAS, DANIEL FARIAS, ROSA FARIAS AND ADELAIDE FARIAS, MINORS AS AFORESAID; MARY FARIAS, SARAH FARIAS NUNES, LYDIA FARIAS AH CHIN, ANGELINA FARIAS AND JOHN M. FARIAS; AND THE SOCIEDADE LUSITANA BENEFICIENTE DE HAWAII, AN HAWAIIAN CORPORATION.

No. 954.

SUBMISSION WITHOUT ACTION.

ARGUED JULY 12, 1916.

DECIDED AUGUST 3, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

BENEFICIAL ASSOCIATIONS—*validity of declaration—change in by-laws.*

A declaration designating the beneficiaries of a death benefit which was valid under the by-laws in force at the time it was made and valid also under those in force when the declarant died, will take effect according to its terms, unaffected by changes which occurred in the interim.

SAME—*death benefits—by-laws construed.*

The by-laws of a mutual benefit society provided that upon the death of the wife of a member he should be paid a benefit through an assessment of twenty-five cents levied upon each married member of the society. Upon the death of the wife of a member he was paid such a benefit amounting to \$262.25. Subsequently, by amendments to the by-laws the system was changed, and it was then provided that upon the death of the wife of a member he would be paid a benefit in the fixed sum of \$400; it was provided also that upon the death of a member his beneficiaries would be paid a benefit in the sum of \$1500 if he "shall not have at any time received a death benefit by reason of the death of his wife,"

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and that if he "shall have at some time received a benefit upon the death of his wife" the sum payable to his beneficiaries would be \$1100. Held, that upon the death of the member who had received the benefit of \$262.25, upon the death of his wife, his beneficiaries were entitled to demand from the society only the sum of \$1100.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

The plaintiff is the widow of Antonio Medeiros Farias, deceased, who at the time of his death was a member of the Sociedade Lusitana Beneficiente de Hawaii, an incorporated mutual benefit society. The defendants, other than the corporation, are the children of the said Antonio M. Farias by a former marriage, and such of them as are minor are represented by their guardian, E. G. Da Silva. The agreed facts out of which the main controversy has arisen are substantially as follows: The deceased became a member of the society on December 8, 1890, and remained a member in good standing until his death; his first wife died on or about the 22d day of September, 1907; on September 30, 1907, the deceased filed with the society a written declaration disposing of the death benefit which, under the by-laws of the society would become payable upon his demise, one-half to his daughter Angelina and the other half to be equally divided among his other children, subject to certain conditions not material here; in the by-laws which were then in force (adopted in 1903) it was provided that upon the death of any member in good standing a death benefit consisting of the sum of one dollar to be paid in by each member would be collected by the society and "paid as a death benefit in the following order: 1st. To the widow. 2nd. To the children" of the decedent, with the proviso that "The provisions of this article with relation to the persons who shall receive the death benefit are not absolute, the member having the power to dispose of not more than half of the death benefit to his children. If he shall leave a widow only, he shall have the right to dispose

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of not more than half to his parents and to his brothers and sisters" (Art. 23); there were other provisions in those by-laws which would apply in the event that the deceased member should leave neither widow nor children (Arts. 24, 25); there was no special provision covering the case of a member leaving children but no widow, but article 29 provided that "The provisions of Articles 23, 24, 25 and 26 can be carried into effect in accordance with the wish of the member by his declaring to what ones of the persons named and in what shares the part of his death benefit shall be paid by using a form furnished by the Society and filed with it;" the deceased married the plaintiff on October 15, 1910; he died on February 8, 1915, and left no children by either marriage other than those above named; in a new set of by-laws adopted to be in force from and after January 1, 1914, it was provided that there should be a death benefit fund which would be composed of the balance then in such fund together with such part of the monthly dues of members as should be set apart therefor by the board of directors (Art. 20), and that upon the death of a member the society would pay to the beneficiaries the sum of \$1500, except as provided in article 24, which will be referred to in connection with the controversy between the society and the other parties hereto (Art. 22); the by-laws in force at the time of the death of the deceased also contained the following provisions: "If there shall be unmarried children under sixteen years of age, born of a previous marriage, half of the death benefit shall be paid to the widow and the other half shall be divided in equal parts between all the unmarried children who are under sixteen years of age" (Art. 25); "Every member of legal age who shall be of perfectly sound mind shall have the power to dispose of the death benefit within the circle of his family, by which is meant parents, children, widow, brothers and sisters" etc. (Art. 26); and "Whenever the member shall not dispose of

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the death benefit in the manner indicated by the By-laws and the circumstances referred to in Article 24 (admitted to be a typographical error and meaning article 25) shall not exist, the Board of Directors shall pay the death benefit to the relatives in the order following: (1) To the widow. (2) To the children. (3) To the parents. (4) To the brothers and sisters" etc., (Art. 30).

On behalf of the plaintiff it is contended that under the by-laws which were in force at the date of the declaration made and filed by the decedent he was without power to designate his children as beneficiaries to the extent of more than one-half of the death benefit or, as between them, as beneficiaries in other than equal shares, and that as the declaration named the children as sole beneficiaries and in unequal shares it was invalid and void; also that the new by-laws could have no "retroactive" effect and, therefore, have no application in the premises, but that the by-laws which were in force at the date of the declaration apply, and that as under those by-laws no member leaving a widow could deprive her of more than one-half of the death benefit, the declaration of the decedent was inoperative at least as to one-half which is the amount now claimed by the plaintiff. And while counsel in their brief, referring to the by-laws of 1914 and the question whether article 25 applies to this case, say that "this question can be material only in the event that the declaration or designation filed by the member in 1907 should be held by this court as having been rendered valid and operative by said Article 26," and say also that they "are forced to concede that after a careful consideration" of the question whether article 25 or article 26 is applicable "they have come to the conclusion that article 26 takes precedence over Article 25," yet they claim that the plaintiff is entitled to one-half of the benefit "whether Section 25 applies or not."

On behalf of the defendants, other than the society, it is

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contended that the by-laws in force at the date of the death of the decedent control; that the declaration filed in 1907 was a valid declaration when it was made, but that as it was revocable and did not take effect until the death of the declarant, the by-laws in force at the time it was made have no application; that article 25 of the by-laws of 1914 applies only in cases where no declaration has been made and filed by the deceased member; and that article 26, under which the declaration in question is unobjectionable, governs the case.

It must be conceded that if the decedent had died prior to January 1, 1914, when the new by-laws took effect, his widow, though no provision was made for her in the declaration, would have been entitled to one-half of the death benefit. But that event did not occur. At the time the decedent filed the declaration he had no wife living, and we think that under the by-laws then in force he had the right to designate his children as the sole beneficiaries of the benefit in the manner in which he did. Under article 23 of the by-laws then in force a death benefit was not to be *divided* between the widow and children, but was payable "*in the following order: 1st. To the widow. 2nd. To the children.*" That is to say, if the member had filed no declaration and left surviving a widow and children the widow would have taken the whole benefit. But article 29 provided that the provisions of article 23 "can be carried into effect in accordance with the wish of the member by his declaring to what ones of the persons named and in what shares the part of the death benefit shall be paid," and under the authority of that article a member leaving children but no widow at his death could have designated his children as sole beneficiaries in unequal portions. The declaration of the decedent, therefore, was valid when it was made, and it is not necessary that the by-laws of 1914 be given a retrospective effect in order to render it valid. It

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will not be necessary to further consider counsel's argument which is based on the assumption that the declaration was not a valid one at the time it was made, or to consider the question whether a designation is effective which though violative of the by-laws in force when it was made is in harmony with those in force at the time of the death of the member. We are satisfied that the declaration in question was in harmony with the by-laws of 1914. Article 25, by express reference thereto in article 30, is connected therewith and must be regarded as operative only in the event that the deceased member filed no declaration. Under the plain provisions of article 26 the decedent was authorized to "dispose of the death benefit within the circle of his family." That he did do by naming his children. The fact that if the decedent had died prior to the amendment of the by-laws the widow would have shared in the benefit does not affect the case. The contract of membership was between the society and the decedent. His wife had no vested interest in the death benefit at any time during the lifetime of her husband, and there was nothing to prevent a change being made in the by-laws affecting the rights of widows of members in any case, at least, where the wife was not named in the declaration as a beneficiary. We hold that as the declaration designating the beneficiaries of the death benefit was valid under the by-laws in force at the time it was made, and was also valid under those in force when the decedent died, it will take effect according to its terms, and is not affected by the changing circumstances of the interim. The children of the decedent are entitled to the benefit, and his widow has no claim therein.

The second part of this controversy involves the right of the society to make certain deductions from the death benefit payable to the beneficiaries. By the agreed facts it is admitted that the society is authorized to deduct the sum of \$184.50 for funeral expenses paid and attorney's

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fees incurred by it, but it asserts, and the other parties deny, that it may deduct the further sum of \$262.25 which represents the amount of a death benefit paid to Antonio M. Farias at the time of the death of his former wife. The dispute arises out of the following circumstances. Under the by-laws of 1903, which were in force when the former Mrs. Farias died (September 22, 1907), it was provided by article 35, that upon the death of the wife of any member who shall be in the enjoyment of all his rights the society should collect from each of the married members the sum of twenty-five cents which should constitute a benefit payable to the widower to aid in defraying the expenses of his wife's funeral: This assessment the decedent had regularly paid as required up to the time of his former wife's death and upon her death was paid the benefit, as above stated, amounting to \$262.25. Under the by-laws of 1903, the ordinary benefit payable to beneficiaries upon the death of a member was raised by an assessment of one dollar upon each surviving member. Under amendments made to the by-laws in 1909 the system was changed. The special assessments were abolished and the death benefits in fixed amounts were to be paid out of a fund of the society derived from the regular monthly dues which were then increased. It was then provided that upon the death of a member who shall have received a benefit upon the death of his wife the society should pay to his beneficiaries a benefit in the sum of \$1100, and, if he had not received such benefit, the beneficiaries would be paid the sum of \$1500, the benefit payable to a member upon the death of his wife being fixed at \$400. These provisions were substantially reenacted in the by-laws adopted in 1912 with the further provision, however, that in case the sum received by the member upon the death of his wife shall have been less than \$400 "the Society shall pay to the beneficiaries out of the death benefit fund a sum which with that so received

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by the member shall make a total of \$1500." In the by-laws of 1914 this last quoted clause does not appear. It was therein provided that "Upon the occasion of the death of any member * * * who shall not have at any time received a death benefit by reason of the death of his wife, the Society shall pay to the beneficiaries in accordance with these by-laws the sum of \$1500, if the member be of the Adult Class, and \$500 if the member be of the Juvenile Class" (Art. 22). Also that "Upon the occasion of the death of the wife of any member of the Adult Class * * * there shall be paid to such member out of the Death Benefit Fund the sum of \$400" (Art. 23). And further that "Upon the death of any member of the Adult Class * * * who shall have at some time received a benefit upon the death of his wife, there shall be paid to the beneficiaries in accordance with these by-laws the sum of \$1100" (Art. 24).

The contention advanced against the claim of the society is to the effect that the abolition of the former system of death benefits from special assessments and the substitution of benefits in fixed amounts payable out of a special fund maintained for the purpose by the society so altered the situation that any benefit paid to a member under the old system is not to be taken into consideration, especially where, as in this case, the benefit paid to the decedent in 1907, upon the death of his former wife, had practically been "paid for" by him through the payment of special assessments upon the death of wives of other married members; that as the decedent had not been paid the \$400 benefit under the later by-laws his beneficiaries should now be paid the sum of \$1500 less only the sum of \$184.50 which is admittedly deductible; and that this makes for reasonableness and equality, and is a fair construction of the provisions in force at the date of the death of the decedent. On behalf of the society it is pointed out that under article 22 of the by-laws of 1914 the death benefit of \$1500 is payable

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to the beneficiaries in case the deceased member "shall not have *at any time* received a death benefit by reason of the death of his wife," and that the provision of article 24 is that the benefit shall be \$1100 when the deceased member "shall have *at some time received a benefit* upon the death of his wife." The society, however, is not insisting upon the right to deduct the sum of \$400 by reason of the payment of the benefit upon the death of the former Mrs. Farias, but only the amount of the benefit then actually paid, i. e., \$262.25. Conceding that there is some force in the line of argument made on behalf of the beneficiaries, we cannot avoid the effect of the clear language of the 1914 by-laws, as above quoted, and upon which counsel for the society lays stress. We have no doubt as to the validity of these provisions and we hold that the proper construction of them as applied to this case is that as the decedent did receive a death benefit from the society upon the death of his former wife his beneficiaries are now entitled to be paid only the sum of \$1100 less the sum, above mentioned, of \$184.50. But in view of the position taken by the society that it is prepared to pay the sum of \$1053.25, judgment will be entered for that amount in favor of the defendants, other than the society, against the society.

J. W. Russell and T. E. M. Osorio for plaintiff.

A. Perry for the defendants other than the society.

W. J. Robinson for the society.

Syllabus.

TERRITORY v. JAMES P. CURRAN.

No. 939.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED JULY 6, 1916.

DECIDED AUGUST 4, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CONSTITUTIONAL LAW—*sixth amendment—confrontation by witnesses in criminal cases.*

The constitutional right of confrontation is satisfied when the advantage of seeing the witness face to face and the opportunity to cross-examine him has once been accorded the accused.

CRIMINAL LAW—*evidence—testimony of absent witness.*

The absence from the jurisdiction of a witness for the prosecution, though only temporary, is a ground for the admission of his testimony given at a former trial of the case when the defendant has opposed a postponement of the case and insisted upon an immediate trial.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Quarles, J., dissenting.)

This case comes to this court upon the defendant's bill of exceptions. The defendant has no counsel, and no brief has been filed on his behalf. The record has nevertheless been examined and the only exception which seems to require notice is that which was taken to the admission in evidence of the testimony of one Derda who testified as a witness on a prior trial of the case but who was absent from the Territory at the time of the trial which resulted in the conviction of the defendant.

The defendant was charged with having committed the offense of assault and battery, and, the jury having disagreed, the case was called up again for trial on the 22d

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day of November, 1915. At the outset counsel for the defendant interposed an objection to certain jurors who had been summoned under a special venire. The court suggested that the case should be postponed for two weeks, upon the idea, apparently, that the ground of objection would in the meantime have been removed. After some discussion the suggestion was accepted by counsel. The prosecuting attorney then stated that as the trial was to be postponed he would ask that it stand over until the 15th of December for the reason that an important witness for the prosecution (meaning Derda) who was expected to return (to Honolulu) on November 13 would not return until December 14, by a transport due to arrive on that date. To this, defendant's counsel objected, stating that the prosecution had already been granted a continuance because of the absence of that witness. The upshot of the discussion which followed was a mutual agreement that the trial should be proceeded with at once. The trial having been commenced, the prosecution put in testimony showing that the witness Derda is an enlisted man in the United States army stationed at Honolulu; that on account of the illness of his wife he was granted a furlough for the period of eighty-three days and left for San Francisco on the transport "Logan" on September 4, 1915; that the furlough would expire on December 4, and that he was expected to reach Honolulu on the transport which would arrive on the 13th or 14th of December; and that he was not in the Territory at the time of the trial. It further appeared that the prosecuting officers knew that the witness was intending to leave the Territory on furlough and took no steps to subpoena him or have him detained as a witness. The court reporter was then called and testified to having recorded the testimony of Derda as given on the previous trial of the case, and that he had correctly transcribed his shorthand notes. The transcript of the testimony of the witness

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was then offered in evidence and admitted over the objection of the defendant. The grounds of objection were stated by counsel to be that the evidence was in violation of the provision of the Sixth Amendment which entitled the defendant to be confronted with the witnesses against him; that the witness in question was not shown to be permanently absent from the Territory; and that the prosecution was negligent in not seeking to keep the witness in the jurisdiction, and in not making application for a continuance of the case until his return. When the evidence was offered the court again suggested that the case might be postponed, saying "The court is well aware that the defense has had its own choice in this matter, from the time the matter was called for trial yesterday, they could proceed or take a continuance, and they have that same choice right now." The defendant did not accept the suggestion that a continuance be taken, but elected to insist on his right to a speedy trial and to stand upon the exception taken to the admission of the evidence.

We think the question is to be decided without reference to the statute (R. L. 1915, Sec. 3821) relating to the admissibility of depositions "taken in the preliminary or other investigation of any charge" etc., which, in our opinion, does not apply to this case.

The constitutional right of the accused in a criminal case to be confronted with the witnesses against him is in the nature of a privilege which he may waive. *Diaz v. United States*, 223 U. S. 442, 450; *Republic v. Yamane*, 12 Haw. 189, 221. And where it has not been waived the requirement is satisfied when the opportunity has once been accorded and the witness has since become unavailable. "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used

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against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. * * * The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Mattox v. United States*, 156 U. S. 237, 242, 244. Though the principle is perfectly well established there is considerable conflict in the decided cases as to its application under various circumstances. The matter of its application in a case like this is an open question in this jurisdiction, and we are at liberty, within the principles of the common law as ascertained from the English and American decisions, to adopt the view which according to reason and authority would better promote justice. It has been held that former testimony of a witness is admissible on a second trial of the case only where the witness has died. But the overwhelming weight of authority is against that narrow view. The principle of the common law under which the secondary evidence is admitted is based upon the unavailability of the witness at the time of the trial and the necessity of the case. 2 Wigmore, Ev., Sec. 1402. The immediate point in the case at bar is whether the former testimony of an absent witness is admissible where it appears that the witness is only temporarily absent and will probably return to the jurisdiction. It has been held in a number of cases that the evidence is not admissible unless it be shown that the witness is absent permanently or for an indefinite length of time. The text-writers generally state the rule broadly that absence of a witness from the jurisdiction is a

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ground for the admission of his former testimony. 1 Starkie's Evidence, 310; 1 Greenleaf Ev., Sec. 163; 2 Wigmore, Ev., Sec. 1402; 12 Cyc. 544; 8 R. C. L. 88; 10 R. C. L. 966. "In fact, every text writer of any note, or that has been recognized by the courts of last resort, so far as we have been able to ascertain, adheres to that line of decisions which holds that the testimony of a deceased witness, or a witness beyond the jurisdiction of the court, may be reproduced where the accused has once been confronted by the witness." *Robertson v. State*, 63 Tex. Cr. 216, 224. "At common law, the testimony of a witness given upon a former trial of a cause between the same parties was admissible for or against either party, upon showing that he was dead or without the jurisdiction of the court. Such was the undoubted rule of evidence at common law, and before the adoption of the codes it was sanctioned and employed in this state." *People v. Bird*, 132 Cal. 261, 263. In the 16th edition of Greenleaf which was edited by Professor Wigmore a new section (Sec. 163g) was inserted wherein it is stated that "mere absence, however, may not be sufficient, and it is usually said that a residence or an absence for a prolonged or uncertain time is necessary." But the professor in his later work says, "The absence, it is sometimes said, must be by way of *residence*, not merely a temporary sojourn, because otherwise the trial could be postponed until his return. This, however, seems too strict a rule; by his absence he is at the time actually unavailable, no matter when he is to return; and, if the witness is not of such importance as to require a postponement until his return, still more if the opponent does not desire or consent to a postponement, there is no reason for distinguishing between temporary and permanent absence." 2 Wigmore, Ev., Sec. 1404. The force of the eminent author's statement is evident, and its application to the circumstances of the case at bar particularly pointed. See also the case of *People*

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v. *Droste*, 160 Mich. 66, where the former testimony of a witness who was ill was held properly admitted, and the court pointed out that the defendant did not ask for a continuance and did not assent to the suggestion of the court that the witness be examined at her home. Indeed the fact that the unavailability of a witness is of a temporary nature would seem to have more to do with the matter of postponing the trial of the case than with the admissibility of the evidence in the event that the trial has been proceeded with. And so in a great many cases the former testimony of an absent witness has been admitted without any showing that the absence was permanent or for an indefinite time. See *People v. Devine*, 46 Cal. 45; *State v. Walton*, 53 Ore. 557, 563; *Ter. v. Evans*, 2 Idaho 627; *Warren v. State*, 6 Okl. Cr. 1, 11; *Poe v. State*, 129 S. W. (Ark.) 292; *Meldrum v. State*, 146 Pac. (Wyo.) 596; *State v. Moeller*, 24 N. D. 165; *State v. Heffernan*, 24 S. D. 1. "If the testimony of a deceased witness given at a former trial of the case against the accused is admissible against him at a second trial of the same case, for the reasons above noticed we can see no reason why the testimony of a witness given at a former trial is not admissible against the accused at a second trial when such witness is beyond the jurisdiction of the court, because in that instance it is impossible for the prosecution to produce such witness in court by process." *Henwood v. People*, 57 Colo. 544, 557. "Logically there seems no middle ground. Unless the requirement of the constitution is complied with, the death of a witness should not permit the use of his testimony. If it is complied with, the evidence should be admitted, unless open to some objection other than the constitutional one. Accordingly, as already stated, in a large number of cases it is held that the absence of the witness from the jurisdiction of the court, and the consequent impossibility of compelling his attendance, justifies the use of his former testimony. While

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there are also many decisions to the contrary, the recent tendency seems to favor the rule stated." *State v. Nelson*, 68 Kan. 566, 570. "It is obvious that this reasoning is quite as forceful and as applicable in a case where the witness is out of the state, and therefore beyond the reach of a subpoena. The state is quite as helpless in procuring his attendance as though he were dead or beyond the sea, and the defendant has had precisely the same advantage in the way of confrontation." *State v. Brown*, 152 Ia. 427, 435. And in those states where the former testimony of an absent witness is admitted under statutory provisions the courts, in sustaining the validity of the legislation, proceed upon the theory that the constitutional provision as to confrontation is declaratory and that the evidence was admissible at common law. See *State v. King*, 24 Utah 482; *State v. Meyers*, 59 Ore. 537; *People v. Elliott*, 172 N. Y. 146. Furthermore it is quite generally held that the evidence is admissible where a witness cannot be found after diligent search without any further showing that he has quit the jurisdiction, or that he has left the state permanently. See *Putnal v. State*, 47 So. (Fla.) 864; *Pope v. State*, 63 So. (Ala.) 71; 1 Greenleaf Ev., Sec. 163. In the analogous case of the absence of a witness on account of illness there is a conflict of authority on the point whether it must be shown that the illness is of a permanent character. In the well considered case of *People v. Droste*, *supra*, the court said, "And upon principle, we are unable to appreciate any good reason why the people or respondent should have the benefit of such evidence in cases where the witness is dead or permanently ill, and be denied that benefit when the witness is only temporarily ill. In all three cases the important fact is identical—the witness cannot be produced to testify before the jury." 160 Mich. 76.

In 1 Greenleaf Ev. (16th ed.) Sec. 163g, it is said the application of the rule in cases where the witness is ill or

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cannot be found, should be, and usually is, left to the discretion of the trial court. And see *Thornton v. Britton*, 144 Pa. St. 126, 131; *Harwell v. State*, 68 So. (Ala.) 500; *King v. McCarthy*, 54 Minn. 190, 195; *Putnal v. State*, *supra*. The reason of the thing applies also in a case where, as here, the witness is temporarily absent from the jurisdiction. Whether or not a temporary absence will furnish sufficient ground for the admission of the former testimony may well be made to depend upon the circumstances of the case. If the prosecution were insisting upon a trial in the absence of the former witness apparently on the theory that it would prefer to have the testimony read to the jury rather than have the witness present, and the defendant was desirous of a continuance till the return of the witness upon the theory perhaps that it would be an advantage to have the jury see and hear witnesses, or, in order that the witness might be more thoroughly cross-examined than he had been at the former trial, the secondary evidence might well be excluded. On the other hand, if the defendant has successfully insisted on an immediate trial and has opposed a reasonable continuance pending the return of the witness, the case is for all practical purposes in the position it would have been in if the witness were permanently out of the reach of the court, or dead. In the case at bar the defendant objected to a continuance till the witness returned, when asked for by the prosecution, and twice refused to accede to the suggestion of the court that the trial should be postponed. In admitting the evidence the trial court exercised its discretion wisely. In now endeavoring to obtain a re-trial the defendant is, in effect, asking for what he refused in the court below, namely, a trial with the witness present. There is little in his position to recommend it.

In the case of *Motes v. United States*, 178 U. S. 458, 474, where a witness for the government who had been in custody was allowed to escape, though it was not shown that

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he had gone beyond the jurisdiction of the court, the admission of his former testimony was held to be error. The court held that former testimony in a criminal case should not be admitted "when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution." In the case at bar we think that the prosecution was not negligent. True, it was known that the witness intended to leave the Territory. But he was an enlisted man in the forces of the United States stationed in this Territory who, because of the illness of his wife, was going to the mainland on a limited furlough, and was under the obligation of the service to return upon its expiration. Under the circumstances we think the prosecution was not obliged to detain the man by subpoena or under the statute relating to the detention of witnesses in criminal cases. If the case could not be postponed until the return of the witness justice required that the testimony given by the witness at the former trial should be admitted.

The evidence in the case was conflicting, but the jury, of course, were the judges of the credibility of the witnesses and the weight of their testimony. There was ample evidence to sustain the verdict.

The exceptions are overruled.

A. M. Cristy, First Deputy City and County Attorney, for the Territory.

DISSENTING OPINION OF QUARLES, J.

I am unable to concur in the conclusion reached by the majority, but do concur in the conclusion of the majority that section 3821 R. L., relating to the admissibility of depositions, does not apply to the case at bar.

In my opinion the evidence of the witness Derda was not admissible. All of the authorities agree that the evidence

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given by a witness at a former trial is only admissible as secondary evidence in cases of necessity. The evidence of said witness was material, and to show its materiality I shall briefly refer to the principal points in the evidence as shown by the record. The vital question in the case is whether or not the defendant struck the prosecuting witness Terry a blow and thereby assaulted and knocked him down. On this point five witnesses, besides the witness Derda, testified to having seen the assault or blow struck. The prosecuting witness Terry testified that he did not see the party who struck him—did not know who struck him. The witness Yarrick, who was standing immediately in front of Terry when the latter was struck, facing Terry and talking to him, did not see the party who struck the blow. On behalf of the prosecution the witness, Hiram Kerr, testified that he saw the defendant strike Terry and that defendant hit Terry on the back of his head and the latter fell on his back. The statement of itself is inconsistent and improbable, and the witness Kerr, on cross-examination, admitted having changed his evidence in several material matters from what it was at the former trial. The absent witness testified at the former trial that he saw the defendant strike the prosecuting witness Terry, but the evidence shows that he was a stranger to the defendant, as does that of nearly all of the witnesses. On the other hand the defendant testified positively that he did not strike the prosecuting witness Terry and was not near him at the time he was struck. Richard F. Moorhead, Emmil Wagner, Jack Hill and Matthew M. Kearney, each and all testified that they saw the prosecuting witness Terry when he was struck and knocked down; that the defendant did not strike Terry; that Terry was struck by a tall slender man who walked down Hotel street Ewa way a short distance and then crossed over Hotel street to the alley leading to the Bijou theater. The appearance and build of this man, be-

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ing tall and slender, was in striking contrast with that of the defendant, who was heavy and stockily built and not so tall. The overwhelming weight of the testimony is to the effect that the defendant did not commit the assault charged against him, yet under the rule established by appellate courts that a verdict in a criminal case will not be reversed when the evidence is conflicting and there is a scintilla of evidence supporting the verdict, harsh as the rule appears, prevents a reversal on the ground that the verdict is contrary to the weight of the evidence. These observations show the importance of the evidence of the witness Derda against the defendant, and, if that evidence was improperly admitted, an affirmance of the judgment upon the verdict could not be had upon the idea that the jury would have found the same verdict even if the evidence of Derda had not been admitted. If wrongfully admitted the admission of Derda's evidence was clearly prejudicial error which of itself necessitates a reversal and a new trial.

The position taken in the majority opinion that forsooth the defendant made an objection to the manner in which the jury was being selected and the trial judge then offered to continue the case two weeks and the prosecution asked that it go over for a little longer time or until after the 13th of December, to which the defendant failed to agree, is not sufficient excuse upon which to predicate the admission of evidence not otherwise admissible. Nor was the suggestion made by the trial judge during the trial, that the case could be continued until Derda's return and the failure of the defendant to agree thereto, sufficient upon which to predicate the admission of evidence not otherwise admissible. To my mind the idea seems novel that it is the duty of the defendant to prepare or help to prepare the case against himself. Such may be correct practice, but to the writer, if it be, it is certainly something heretofore unknown to him.

A careful perusal of the record, which is very lengthy,

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consisting of more than 400 typewritten pages, convinces me that many of the rulings of the court in admitting evidence over the objections of the defendant, and to which some of the exceptions go, were erroneous. A number of the exceptions go to the admission of evidence given by the prosecuting witness Terry and the witness Alfred Mia, tracing the actions and movements of the prosecuting witness from the time that he reached Honolulu from Pearl Harbor at 4:55 P.M. on the day of the assault up to the time of the assault. Such evidence to my mind was immaterial. But the prosecution connected it with statements made by these two witnesses showing that at a number of times during the evening they saw the defendant Curran, and their evidence had a tendency to show that Curran was shadowing the prosecuting witness. Their statements, however, are flatly contradicted by Curran and by the witnesses Max Lange and Walter A. Wood, showing that the defendant was at the Criterion bar at the corner of Hotel and Bethel streets from 4 to 6 P. M. on the said day, while the witness William Armstead and the defendant testified that the defendant was at said Criterion bar from a little after 4 P. M. to 8 P. M. on the said day. On this particular point again we find the weight of the evidence decidedly against the contention of the prosecution and in favor of the defendant.

This brings us to the principal question in this case. We have no statute making the evidence of an absent witness, given at a former trial, admissible at a later trial, and hence if admissible it must be so under the common law which is in full force in this jurisdiction where a rule of the common law relating to substantive right is binding upon this court until changed by statute (*Macaulay v. Schurmann*, 22 Haw. 140). All of the authorities agree that if the evidence of a witness given at a former trial in the same case be admitted on some rule of the common law or statute making it admissible, that the constitutional right of the defendant

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to confront and cross-examine the witness is not violated he having had the opportunity of confrontation and cross-examination at the former trial. Hence the question before us is to be decided entirely outside of the constitutional question. I shall briefly review some of the authorities, English and American, touching the question under consideration.

"It is an incontrovertible rule, that when the witness himself may be produced his deposition cannot be read, for it is not the best evidence. But the deposition of a witness may be read not only where it appears that the witness is actually dead, but in all cases when he is dead for all purposes of evidence; as where diligent search has been made for the witness, and he cannot be found, where he resides in a place beyond the jurisdiction of the court, or where he has become lunatic or attainted" (1 Starkie's Evidence 310, 311).

In Buller's Law of Nisi Prius 242, it is said: "And by 1 & 2 P. & M. c. 13 and 2 & 3 P. & M. c. 10 justices of the peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and these examinations shall be read against the offender upon an indictment, if the witness be dead."

It was a rule of the common law that if a witness be dead or be diligently sought for and cannot be found (the same as dead to the party desiring his evidence) his deposition, taken in a case involving the same matters and between the same parties, is admissible. Godbolt 326; Bull. N. P. 239.

"Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead, or is mad, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party, or in civil, but not, it seems, in criminal cases, is out of the jurisdiction of the court, or,

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perhaps, in civil, but not in criminal, cases when he cannot be found" (Stephen's Evidence, Art. 32).

Stephen cites as supporting the rule *Rex v. Hogg*, 6 C. & P. 176; *Reg. v. Scaife*, 5 Cox Cr. 243, 244; *Fry v. Wood*, 1 Atk. 444. To the same effect is the decision in *Lord Morly's case* decided in the year 1866 and reported in Kel. 53, 55, and the decision in *Reg. v. Hagan*, decided in 1837, reported in 8 C. & P. 167.

In *Reg. v. Scaife, supra*, Scaife was indicted with two others on the charge of larceny. One of the defendants, Smith, it appears, contrived to get a witness, one Ann Garnett, who had been examined before the magistrate upon the committal of the prisoners, to absent herself from the trial. Her deposition was admitted against all of the defendants. The court of Queen's Bench in 1851 reversed the judgment as against Scaife and his codefendant, other than Smith, upon the ground that the deposition of said Ann Garnett was improperly admitted in evidence. Lord Campbell, chief justice, in commenting upon the admission of the deposition, said: "Then, is such a document admissible against a prisoner without proof either that the deponent is dead, or that he is kept away by the contrivance of the prisoner, upon the bare ground that the witness is absent and cannot be found? No case has gone so far hitherto, and I should be sorry that we should now make a precedent, which might have the effect of depriving the accused person of the advantage of having the witnesses against him examined personally in the presence of the jury, with full liberty for the accused to examine upon all matters which may be material to his defense." In the same case Coleridge, J., said: "Before the recent statute (11 & 12 Vict. c. 42), the deposition of an absent witness was only admissible in case of the death of the witness, or his absence being procured by the prisoner. All other cases were in one category, and the depositions of absent witnesses were in-

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admissible. The recent statute (11 & 12 Vict. c. 42) took the case of sickness such as to incapacitate the witness from traveling out of that category, and classed it with the two other excepted cases." In the same case Erle, J., said: "As regards the two prisoners Scaife and Rooke, the admissibility of this document rests only upon the absence of the witness. There is no valid authority that that is sufficient to make a deposition of this kind receivable in evidence."

Phillipps on Evidence, pp. 368, 369, says: "Before the statutes of Philip and Mary, a deposition taken before a justice of the county, where a felony was committed, would not have been evidence, even though the witness had died, or was unable to travel."

"The deposition of a witness, taken upon oath, in the presence of a prisoner, who has been brought before the magistrate on a charge of felony, may be given in evidence on the trial of an indictment for the same felony, if it be proved on oath, to the satisfaction of the court, that the informant is dead, or prevented by sickness from attending, or that he is kept away by the means and contrivance of the prisoner; provided also, that the deposition, offered in evidence, is proved to be the same as was sworn before the justice, without any alteration."

The common law rule as to admitting the deposition of an absent witness, as amended by the Stat. Geo. 4, c. 65, is stated in 2 Starkie's Ev., 383, as to preliminary proof, laying the predicate therefor, to be as follows:

"It must also be previously proved that the witness is dead; or that he has been kept away by the practices of the prisoner, or, as has been said, that he is unable to travel. It seems, however, to be very doubtful whether the mere casual and temporary inability of the witness to attend in a criminal case, be a sufficient ground for admitting his deposition, which affords evidence of a nature much less satisfactory than the testimony of a witness examined *viva voce* in court, and which might be procured at another time if the trial were postponed." To the same effect is the text in 3 Russell, Cr. 466.

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I have been unable to find any text writer or any English decision to the effect that prior to the colonization of America proof of the temporary absence of a witness furnished a sufficient predicate at common law for introducing his evidence given at a former trial, but the English decisions are all to the contrary under the common law, and this is especially so in criminal cases. Not even by statutory amendments have the exceptions to the rule against introducing such evidence been extended in England so as to admit such evidence on the bare showing of temporary absence. Some of the American States have adopted statutes broad enough to admit such evidence and to support the rule adopted by the trial court, and sanctioned in the majority opinion, that the evidence of said witness Derda was admissible on showing that he was temporarily absent from this jurisdiction and soon to return. Our legislature might have changed the common law rule in this regard by making the evidence of a witness given at a former trial and reported by the official stenographer admissible in evidence at a succeeding trial when the presence of the witness at a succeeding trial could not for any reason be obtained, but it has not done so. Many States have enacted such a statute, among others the following: California (*Hicks v. Lovell*, 64 Cal. 14, 22; *People v. Plyler*, 126 Cal. 379); Georgia (*Eagle etc. Co. v. Welch*, 61 Ga. 444, 448); Idaho (*Territory v. Evans*, 2 Idaho 627, 632); Kansas (*New v. Smith*, 94 Kan. 6); Kentucky (*Sievers-Carson Hardware Co. v. Curd*, 71 S. W. 506); Maine (*Edgerley v. Appleyard*, 86 Atl. 244; *State v. Frederic*, 69 Me. 400); Missouri (*Ratliff v. Quincy, O. & K. C. R. Co.*, 131 Mo. App. 118); Montana (*Mette & Kanne Dis. Co., v. Lowrey*, 39 Mont. 124, 132); New York (*Fortunato v. City of New York*, 77 N. Y. S. 575; *People v. Elliott*, 172 N. Y. 146; *Shaw v. N. Y. Elevated R. Co.*, 187 N. Y. 186; concurring opinion of Follet, J., in *Mut. Life Ins. Co. v. Anthony*,

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4 N. Y. S. 501); Oregon (*Beard v. Royal Neighbors of America*, 60 Ore. 41, 44); Pennsylvania (*Commonwealth v. Cleary*, 148 Pa. St. 26); Utah (*State v. Hillstrom*, 150 Pac. 935; *State v. King*, 24 Utah 482); Washington (*Knutson v. Moe Bros.*, 72 Wash. 290, 130 Pac. 347); West Virginia (*Bare v. Victoria Coal & Coke Co.*, 80 S. E. 941).

Colorado has a provision in its constitution authorizing the taking of depositions and their use in criminal cases. In *Ryan v. People*, 21 Colo. 119, it was held that the provision being a modification of the general rule that upon final trial the accused must be confronted with the witness against him all of the requirements as to the taking of such depositions must be strictly complied with unless waived by the accused. Decisions from the States adopting such statutes are not authority here where the question is whether or not the admission of Derda's evidence is authorized at the common law. 1 Greenleaf Ev., Sec. 163, is often cited as sustaining the admissibility of evidence when the witness cannot be found. That authority and decisions holding the same thing are not authority authorizing the admission of Derda's evidence for the reason that Derda could be found; his whereabouts were known, and his return to this jurisdiction was to take place within a few days after the commencement of the trial. There are numerous decisions holding that under such circumstances the party desiring his evidence should move for a postponement of the trial. The bare suggestion that a trial be postponed is not an application for a postponement. The matter of postponing a trial is largely in the discretion of the trial court, as has been held by this court (*Waldeyer v. Wailuku Sug. Co.*, 19 Haw. 245), and, as heretofore suggested, a mere oral request by the prosecuting attorney, or a suggestion by the court, although not agreed to by the defendant, does not waive any right as to postponement or as to the admissibility of evidence if the trial proceeds. An

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application for a postponement must be made on a proper showing. The learned author in 1 Greenleaf Ev., Sec. 163, cites, as sustaining the proposition that if a witness who testified at a former trial cannot be found his evidence is admissible, the following: Bull. N. P. 239, 242; Starkie's Ev., 264; 12 Vin. Abr. 107, A, b. 31; Godb. 326, and *Rex v. Eriswell*, 3 T. R. 707, 721. None of the authorities cited sustains the rule in a criminal case in the absence of a statute. Professor Wigmore, in his edition of Greenleaf on Evidence (Vol. 1, Sec. 163f, 16 ed.), says, *inter alia*: "So far as confrontation is concerned, then, the only question is whether it can be had under the circumstances of the case; if it can be, it must be; if not, it may be dispensed with;" and (in Sec. 163g), "Mere absence, however, may not be sufficient, and it is usually said that a residence or an absence for a prolonged or uncertain time is necessary." It does not seem correct or logical to say that a witness whose whereabouts is known and whose presence at the place of trial is to take place within a few days makes it impossible to have the witness in person at the trial. Consequently, under such circumstances, the rule laid down by Professor Wigmore in Sec. 163g, *supra*, does not sustain the rule adopted in the majority opinion. Professor Wigmore cites in a note to Sec. 163g, *supra*, to sustain the proposition that temporary absence is not sufficient to authorize the admission of evidence given at a former trial, the following decisions: *Fry v. Wood*, 1 Atk. 445; *Roe v. Jones*, 3 Low. Can. 58; *Sutor v. McLean*, 18 U. C. Q. B. 492; *Mims v. Sturtevant*, 36 Ala. 64. In *Fry v. Wood*, *supra*, the parties agreed that a deposition taken in a chancery case could be used in a case at law between the same parties, the witness being dead or sick or out of the Kingdom. A long line of Alabama cases, including *Mims v. Sturtevant*, *supra*, establish the rule beyond question that the temporary absence of a witness is not a sufficient predicate to authorize the

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introduction of his evidence given at a former trial. In 2 Wigmore Ev., Sec. 1402, it is said, *inter alia*:

"The principle upon which depositions and former testimony should be resorted to is the simple principle of necessity,—i.e. the absence of any other means of utilizing the witness' knowledge. If his testimony given anew in court cannot be had it will be lost entirely for the purposes of doing justice if it is not received in the form in which it survives and can be had. The only inquiry, then, need be: Is his testimony in court unavailable? We may of course distinguish further between testimony unavailable by any means whatever and testimony unavailable without serious inconvenience. The common law rulings certainly stopped at unavailability of the former sort; conditions of the latter sort rest wholly on statutory sanction."

A statute in Georgia authorizes the introduction of evidence given by a witness at a former trial when his presence is unavailable (*Atlanta & C. A. R. Co. v. Gravitt*, 20 S. E.—Ga.—550).

Before referring to other decisions I will briefly review the principal authorities relied on to support the majority conclusion in this case. In *People v. Bird*, 132 Cal. 261, the witness was dead. What the court said as to the rule at common law when a witness was out of the jurisdiction was purely *obiter*, as a statute of California permitted the use of evidence given at a former trial under the circumstances. In *People v. Droste*, 160 Mich. 66, the absent witness was sick at home and could not attend. The defendant had refused to go to her home to be present at the taking of the deposition and have the opportunity to cross-examine. In *State v. Walton*, 53 Ore. 557, one witness was dead, the other beyond the jurisdiction of the court—whether permanently or temporarily does not appear. The court only considered the constitutional question of confrontation and cross-examination. This decision also was under a statute making the evidence given at a former trial admissible. In *State v. Moeller*, 24 N. D. 165, the witness was shown to be

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out of the State, but whether permanently or temporarily did not appear. The principal objection to the introduction of his evidence given at a former trial was that accused was denied the right at the former trial to fully and fairly cross-examine the witness. This contention was overruled. As I read that case it is not authority for the introduction of the evidence given at a former trial by a witness temporarily out of the jurisdiction. In *State v. Heffernan*, 24 S. D. 1, it does not appear whether the witness was permanently or temporarily absent. The case was discussed and appears to have been decided principally upon the constitutional question of confrontation and cross-examination. In *State v. Brown*, 152 Iowa 427, 432, the evidence of a witness at the former trial was admitted on a showing that the witness was out of the State and in another State. No showing was made as to whether his absence was permanent or temporary. The deposition was admitted under a provision of the Iowa code. In *Henwood v. People*, 57 Colo. 544, the evidence given by two absent witnesses at a former trial, both of whom had left the State and continued out of its jurisdiction, was admitted without objection on the part of the defendant. No showing appears to have been made as to whether the absence of the witnesses was permanent or temporary. The case was decided mainly upon the constitutional question. In *Warren v. State*, 6 Okl. Cr. 1, 5, the absent witness had left the State and gone to another State—whether permanently or temporarily does not appear. The case of *Territory v. Evans*, 2 Idaho 627, was decided upon a statute authorizing the use of the evidence of the absent witness given at a former trial. This case, although cited in the majority opinion and in a number of decisions as sustaining the rule contended for on behalf of the prosecution, was expressly overruled by the supreme court of Idaho in *State v. Potter*, 6 Idaho 584. In *King v. McCarthy*, 54 Minn. 190, it appears that the absent wit-

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ness had left the State and located in St. Louis, Missouri, and was there engaged in business. The court in that case (p. 195) said: "Anything which will reasonably satisfy the court that the absent witness is not likely to return within the jurisdiction of the State may be admitted. See *Wyatt v. Bateman*, 7 Car. & P. 586; *Austin v. Rumsey*, 2 Car. & K. 736; also *Prince v. Blackburn*, 2 East 250." The cases cited in the quotation from *King v. McCarthy* were cases involving the discretion of the trial court in admitting evidence of the handwriting of an attesting witness to a deed or other instrument when the witness is absent from the jurisdiction. In *Thornton v. Britton*, 144 Pa. St. 126, the deposition of a witness eighty-seven years old, infirm and confined to his room, taken in a previous action between the same parties about the same subject-matter, was held admissible, in the discretion of the court, the intimation being that it would not be admissible in a criminal case. In *Putnal v. State*, 47 So. (Fla.) 864, the absent witness was of nomadic habits, in the town for only two or three days, and departing hence, whither no one knew. In *Pope v. State*, 63 So. (Ala.) 71, the whereabouts of the absent witness, whose evidence was offered by the defendant and refused, was unknown; the defendant had used diligent efforts to have him subpoenaed; the circumstances tended to show that he might have been the guilty party, and had fled the State. In *Harwell v. State*, 68 So. (Ala.) 500, diligence had been used to procure the attendance of the absent witness. In *Poe v. State*, 129 S. W. (Ark.) 292, it appears that the rule has been established in Arkansas, by a long line of decisions, that the evidence given at a former trial by a witness who "is dead, beyond the jurisdiction of the court, or on diligent inquiry cannot be found, may be introduced." In *Meldrum v. State*, 146 Pac. (Wyo.) 596, 600, the evidence given by three absent witnesses at a former trial was admitted, it

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being proven that one of the witnesses was dead and the other two in California, diligence being used to procure the attendance of the witnesses. In *State v. McNamara*, 30 S. W. (Ark.) 762, the court cites Greenleaf Ev., Sec. 163, to show that the common law rule admitted evidence formerly given when it was proven that the witness was out of the State or could not be found, but overlooks the fact that the rule applied under the common law only to civil cases and not to criminal cases. In *Hill v. Winston*, 75 N. W. (Minn.) 1030, it was shown that the absent witness lived in Wisconsin when he testified at the former trial, was in Wisconsin at the time of the latter trial and then claimed his home to be in Wisconsin. His evidence at the former trial was admitted, the court saying, *inter alia*: "Anything which will reasonably tend to satisfy the court that the absent witness is not likely to return within the jurisdiction of the State may be admitted."

In addition to the long line of Alabama cases holding that the absence of a witness from the jurisdiction at the time of a second trial does not furnish a sufficient predicate for admitting his evidence given at a former trial, unless his absence from the jurisdiction is shown to be permanent, see *Berney v. Mitchell*, 34 N. J. L. 337; *Gerhauser v. N. B. & M. Ins. Co.*, 7 Nev. 174; *Vandewedge v. Peters*, 83 Neb. 140, 143; *State v. Houser*, 26 Mo. 431.

In *Kirchner v. Laughlin*, 5 N. M. 365, 368, it is held that the evidence of a witness at a former trial, taken by the court stenographer, is hearsay evidence in the absence of a statutory provision declaring it to be evidence. A statute in Alabama permitted the accused to take depositions in certain cases. The accused took some depositions but did not offer them in evidence; the State offered them and the trial court admitted them. This was held to be reversible error (*Anderson v. State*, 7 So.-Ala.-429). In *State v. Chambers*, 10 So. (La.) 886, the deposition of a sick witness was

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taken on petition of the district attorney in the presence of the accused, no statute authorizing the taking of the deposition. The admission of the deposition was reversible error, the court saying: "The evidence against the accused must be delivered personally, and orally before the jury who are to pronounce him guilty or not guilty." A statute in New York authorized the taking of depositions in criminal cases. A deposition was taken in the presence of the accused, the witness being sworn as to the correctness of a former statement, and not sworn to answer truly such questions as should be asked. This deposition was held, in *People v. Restell*, 3 Hill 289, to be inadmissible in evidence under the common law which required the witness against the accused to confront him in court, the only exception to the rule recognized at common law being the dying declarations of the injured party in cases of prosecution for homicide, the court using this pertinent and forceful language: "In our zeal to punish crime great care should be taken not to make precedents which may prove dangerous to the innocent, and it should never be forgotten that even the guilty have rights which should be scrupulously regarded." In *McCrorey v. Garrett*, 109 Va. 645, 649, it is held that the evidence of a witness who is sick with typhoid fever and in the hospital, given at a former trial, is not admissible; that the defendant who desired his evidence should have moved for a continuance. In *St. Louis & I. M. Ry. Co. v. Ingram*, 176 S. W. (Ark.) 692, it is held that the evidence given by a nonresident witness at a former trial, his residence being known, is not admissible, the case in which he testified having been dismissed by the plaintiff and a new one commenced on the same cause of action. In *Robertson v. State*, 63 Tex. Cr. 216, where the court reversed former rulings theretofore reversed and again reaffirmed, one of the absent witnesses was proven to have died and the other proven to have returned to Italy and there established his

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domicil; their evidence given at a former trial was admitted. In Indiana the rule formerly was that to admit the testimony of a witness given at a former trial it must be proven that the witness is dead at the time his evidence is offered (*Woollen v. Whitacre*, 91 Ind. 502; *Wabash R. Co. v. Miller*, 59 N. E.-Ind. App.-485). The rule was extended later so as to admit the evidence given at a former trial by a witness who is a nonresident of the State at the time of offering his former evidence (*Reichers v. Dammeier*, 45 Ind. App. 208).

In *Forney v. Hallagher*, 11 S. & R. 203, the deposition of a witness was taken by consent in arbitration proceedings. On appeal and trial *de novo*, held, that the deposition was not admissible without showing the witness was dead or without the jurisdiction. In *Giberson v. Mills Co.*, 41 Atl. (Pa.) 525, the evidence of a witness for the defendant was offered by the plaintiff and admitted, it being shown that the witness was out of the State. The only objection made to the introduction of his former evidence was that the plaintiff had not shown diligence to procure his attendance and had not caused subpoena to issue for the witness. In *Benson v. Olive*, 2 Str. 920, the English court held that a deposition taken fifty years prior to the trial, and offered without proof of the death of the witness, was inadmissible.

Some decisions not heretofore cited, which are in harmony with my views and out of harmony with the views of the majority, are as follows: *State v. Wing*, 66 Ohio St. 407, 415; *Collins v. Com.*, 12 Bush 271, 273; *State v. Hall*, 6 Baxt. (Tenn.) 522; *State v. Nelson*, 68 Kans. 566; *People v. Newman*, 5 Hill (N. Y.) 295; *Brogy v. Com.*, 10 Grat. 722; *Owens v. State*, 63 Miss. 450; *Bergen v. People*, 17 Ill. 425; *United States v. Angell*, 11 Fed. 34; *Finn v. Com.*, 5 Rand. 701; *Pittman v. State*, 17 S. E. (Ga.) 856.

In my opinion no decision can be found, unless it be

Syllabus.

under modern statutes, holding that the evidence of an absent witness given at a former trial is admissible merely on proof showing that his absence is temporary and that the witness will soon return to the jurisdiction where the action is pending. To my mind the rule established by the majority in this case is without precedent, and while I am of the opinion that the legislature might change the rule of the common law so as to admit the evidence of an absent witness upon a showing that he is temporarily absent and will soon return, yet until the legislature does so I am of the opinion that the courts have no authority to adopt such a rule, which is a modification and an amendment of the common law. As was indicated by Lord Campbell, chief justice, in *Reg. v. Scaife, supra*, and also in *People v. Restell, supra*, courts should be very loath to make precedents contravening the rights of guilty parties and which may jeopardise the rights of innocent parties accused of crime.

TERRITORY v. A. W. BEESON.

No. 956.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JULY 27, 1916.

DECIDED AUGUST 10, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LOTTERIES—slot machine—criminal law.

Defendant conducted a slot machine whereby each nickel played into it brought to the player a package of gum, and, at irregular and uncertain times, dropped into a cup for the player trade

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checks redeemable in merchandise at five cents each, and in multiples of two, the maximum number of trade checks which might be received being twenty; the machine is so arranged that each operation shows just what the succeeding one will distribute; by a series of operations the player may or may not receive trade checks exceeding in value the amount of money which he deposits: Held, that the distribution of merchandise other than the gum involves the element of chance and is a lottery within the meaning of Secs. 4169, 4170, R. L.

OPINION OF THE COURT BY QUARLES, J.

The defendant was charged in the district court of Honolulu with the offense of conducting a lottery, the charge being that he did "on or about the 23rd day of May, 1916, and for one week prior thereto, in the district of Honolulu, City and County of Honolulu, T. H., contrive, prepare, set up, maintain and conduct a certain lottery, to wit: a slot machine for the distribution of property by chance among persons who have paid a valuable consideration for the chance of obtaining a share or interest in such property upon an agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance by whatever name the same may be known, contrary to the provisions of section 4170 R. L. 1915." To the said charge in the district court the defendant entered a plea of not guilty and was tried and convicted. He appealed generally from the judgment of conviction to the circuit court where he waived a trial by jury, was tried *de novo* and again convicted. The case comes here on an exception to the decision and judgment of conviction on the ground that the same are contrary to law and contrary to the evidence. Evidence was introduced in the lower court showing how the slot machine mentioned in said charge is operated. The slot machine itself was introduced in evidence and its operation shown in court. It is admitted by the defendant that he owns and operates the machine. The machine stands

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about four feet in height. Facing the machine small portions of three tapes or ribbons may be seen through a convex window, arranged vertically in the machine, which tapes or ribbons revolve on discs or other contrivances, each having a different velocity from the other. At the top a nickel or American five cent piece is placed in a slot and drops through a tube into the interior of the machine. The operator then pulls a lever which sets in motion the inner mechanism of the machine whereby a package of gum containing three sticks, which, when the machine ceases to revolve—and it does this quickly—the operator or player may by pulling another lever, remove, otherwise it moves to a different place, when the first lever is again manipulated. At irregular times metal trade checks in multiples of two, running from 2 to 20, drop into a cup and are removed by the operator or player. These checks are redeemable at the rate of five cents each in merchandise at the store where the machine is conducted. On examination of the said tapes or ribbons before each manipulation of the lever, and also of the small window in which a figure representing the number of trade checks, if any, to be distributed by the next manipulation of the machine, the player or operator can tell exactly what the next play or operation will distribute. Each play distributes one package of gum provided the operator pulls the second lever and takes it, and if the figure 2 or some other figure appears in the window where the numbers are shown the player knows how many trade checks he will get with the gum.

Arthur McDuffie testified in the lower court that on or about May 23 of the present year he went to a cigar store on Nuuanu street in Honolulu in which the slot machine in question was conducted; that he went there for the purpose of playing said slot machine; that he played twenty nickels one at a time into the machine, drew nothing but gum seventeen times, drew eight trade checks and a pack-

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age of gum at one time, four trade checks and a package of gum at another time, and two trade checks and a package of gum at another time, receiving for the dollar or twenty nickels which he played twenty packages of gum and fourteen trade checks. The evidence showed that similar gum of five sticks to the package sells on the market for five cents, hence the retail market value of the gum delivered by the machine is three cents per package, so that the witness received sixty cents worth of gum and trade checks which he could exchange in the cigar store for goods there sold to the value of seventy cents.

At the hearing in this court the machine was present and was operated by counsel for the defendant. Three operations successively resulted in the distribution of three packages of gum and twelve trade checks, thus returning for the fifteen cents played into the machine in these three operations nine cents worth of gum and goods represented by the trade checks to the value of sixty cents, a return of sixty-nine cents in merchandise for the fifteen cents deposited in the slot of the machine. At the request of one of the justices counsel for defendant then manipulated the machine twenty times in succession with the result that twenty packages of gum were withdrawn from the machine, and the fifteenth operation dropped two trade checks and the seventeenth operation dropped four trade checks, thus making a return for the dollar played, sixty cents worth of gum and trade checks to the extent of thirty cents. We are satisfied from the evidence in the case that gum is distributed by the machine, so long as it is loaded with gum, without the element of chance having anything to do with it—every separate manipulation of the levers bringing a package of gum which the player may withdraw. We are equally satisfied that goods of the owner of the machine represented by the trade checks are distributed by chance through the scheme upon which the interior mechanism

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of the machine is arranged irregularly or at uncertain times over which the players have no control.

It is argued by counsel for the defendant with much force and seriousness that each operation of the machine is separate and distinct from all others; that the machine indicating in advance just what the result will be—one package of gum and a certain number of trade checks, or none—it is simply a question of contract—an offer on the one part and an acceptance on the other, so that there is no element of uncertainty or chance about it. This would be true, perhaps, if each player were confined to one play, in which event the impelling element of chance which appeals to the gaming instinct would be entirely lacking with the result that very few, if any, would play the machine just to get three cents worth of gum for five cents. If the machine said, "Put in a nickel, pull the lever and I will give you three ordinary sticks of gum, but you cannot play me but one time," there would be no element of chance; but is not what it says this? "Put in your nickel, pull lever No. 1 and then pull lever No. 2 and I will give you a package of gum containing three sticks and will then make you another offer which will consist of a similar package of gum and may consist also of trade checks consisting of even numbers, not less than 2 nor more than 20; try your luck, may be you will get a dollar's worth of trade checks and your gum the next time although I only offer you a three-stick package of gum now." This is really the scheme upon which the machine is operated and involves the element of chance so far as the disposal or distribution of the goods represented by the trade checks is concerned and is a lottery within the meaning and intent of sections 4169, 4170 of the Revised Laws, which are as follows:

"Sec: 4169. Lottery defined. A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay valuable consid-

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eration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, che fa, pakapio, gift enterprise or by whatever name the same may be known."

"Sec. 4170. Maintaining or assisting, etc. Every person who contrives, prepares, sets up, draws, maintains or conducts, or assists in maintaining or conducting any lottery is guilty of a misdemeanor."

"Owners and operators of slot machines and wheels of fortune have been held guilty of operating lotteries within penal statutes, even though those who deposited coin in the machines were assured of the ordinary return for their money in addition to the chance of securing a prize" (25 Cyc. 1638, 1639).

In *People v. Jenkins*, 138 N. Y. S. 449, a similar machine was held to be a gambling device under an antigambling statute. After describing the machine and its operation the court said:

"It thus appears that with the dropping of a nickel the depositor always gets his package of gum and always knows the exact number of trade checks which he will receive for that nickel. The element of chance lies in the fact that upon the turning of the lever and the deposit of the gum and number of checks indicated there is further indication of how many trade checks, if any, may be obtained upon the dropping of the second nickel. The number of trade checks, however, which can be obtained upon the dropping of the second nickel is only indicated after the first nickel has dropped and the lever turned. Thus, in addition to the gum and the trade checks indicated as the certain receipts upon the dropping of the nickel, is given an option to obtain a package of gum and an uncertain number of trade checks upon the dropping of the second nickel. That this uncertain option has in it such an element of chance as constitutes gambling can hardly be questioned. In fact, this element of chance only gives to the machine its value, and that its use is within the direct prohibition of the statute seems clear."

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The case of *Yale Wonder Clock Co. v. Surman*, 105 N. Y. S. 1151, which was affirmed in 193 N. Y. 632, is easily distinguished from the case at bar in that accompanying the yale wonder clock was a chart indicating not only how much was to be received for the nickel deposited but also how much was to be received for each subsequent nickel deposited, so that by an examination of the chart the exact return for the nickel was ascertainable and there was no element of chance. In harmony with the New York case is that of *Ferguson v. State*, 178 Ind. 568.

The exception is overruled.

A. M. Cristy, First Deputy City and County Attorney (A. M. Brown, City and County Attorney, with him on the brief) for the Territory.

A. D. Larnach and J. T. DeBolt for defendant.

IN THE MATTER OF THE ESTATE OF ALEXAN-
DRINA LEIHULU CLARK, DECEASED.

No. 935.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED JULY 24, 1916.

DECIDED AUGUST 11, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*probate—decree of distribution.*

For the purpose of appeal a decree of distribution is regarded as a final decree.

DIVORCE—*judgment—collateral attack.*

A decree of divorce rendered by a court having jurisdiction of the subject matter and of the parties cannot be collaterally at-

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tacked for errors or irregularities; that libellee is not notified of the time of the second trial, the original decree having been vacated, is not such a jurisdictional defect as will render the second decree void.

~~SAME~~—*same—effect of vacating.*

Where a decree in a suit for divorce is vacated because thirty days had not elapsed after the completion of service of summons on the libellee, it is proper for the court to treat the suit as still pending and retry the same, after the expiration of the thirty days limited by statute, upon the evidence then adduced.

OPINION OF THE COURT BY WATSON, J.

This is an appeal from a decree of distribution made by a circuit judge of the first circuit sitting at chambers in probate. The case comes to this court on an appeal allowed by the circuit judge as an interlocutory appeal. Such allowance by the circuit judge was not required, as a decree of distribution is for the purpose of an appeal a final decree.

Alexandrina Leihulu Clark, a resident of Honolulu, died intestate on March 23, 1914, leaving no children, or father or mother, or brother or sister, or nephew or niece. Her estate was duly administered upon and upon the petition of the administrator for the allowance of his final accounts, distribution and discharge this controversy arose. Appellee, Henry N. Clark, to whom was ordered distributed the personal property of the estate, claims to have been the husband of Alexandrina Leihulu Clark at the time of her death and as such the sole heir at law of such intestate. This claim was disputed by several persons in the court below, among others, by the appellant, David U. K. Maikai, who, with his brother, Samuel I. Maikai, since deceased, claimed that they were the nearest surviving next of kin of said intestate and as such entitled to all of the property of said estate; that Henry N. Clark was never legally married to Alexandrina Leihulu Clark, because he was never legally divorced from his first wife, generally known as Mrs. Dreier,

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and because intestate was never legally divorced from her first husband, one Morris Keohokalole. Thus it will be seen that the sole question presented for our consideration and determination is whether or not, at the time of the death of Alexandrina Leihulu Clark, Henry N. Clark, appellee herein, was her husband, for if he was it is conceded that under the facts in this case and under the laws of this Territory he is entitled, as sole heir at law, to inherit all of the property of said decedent.

The facts upon which appellant bases his contention, that Alexandrina Leihulu Clark was never legally divorced from her first husband, Morris Keohokalole, were found by the trial judge, and are undisputed, as follows: Intestate married said Morris Keohokalole on November 5, 1887; on April 3, 1911, she filed divorce proceedings against him on the grounds of desertion and failure to provide; a summons was duly served on libellee April 4, 1911, and on the following day libellee answered admitting all the jurisdictional facts but denying the desertion and failure to provide; the action went to trial on April 18, 1911, a decree being granted on that day; this decree was set aside by the trial judge of his own motion on account of a decision of this court (*Markle v. Markle*, 20 Haw. 633) holding that circuit judges were without jurisdiction to hear or determine divorce cases until the expiration of thirty days after the completion of service of summons on the libellee. The case was next tried on December 23, 1911, on the same pleadings, libellant alone being present in court. The transcript of testimony of this second trial, which was introduced and received in evidence in the lower court, and which is included in the record before us, shows that all of the jurisdictional facts were put in evidence and a decree was granted on the last mentioned date. One of the grounds of attack on this decree in the case at bar is directed to the fact that the libellee was not in court and the claim that

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he was not notified of the time and place of the second trial. The circuit judge found that the evidence of Morris Keohokalole in the matter at bar, which has not been sent up as a part of the record herein, was not conclusive on this point, as to whether or not he was notified of the time and place of the second trial, but we will assume in favor of libellant's contention that said libellee was not so notified.

In the Clark divorce the facts were very similar. The libellant in that case, Emma H. N. Clark, generally known as Mrs. Dreier, married Clark October 8, 1910; on August 2, 1911, she filed a libel for divorce against him on the grounds of extreme cruelty and failure to provide; on the following day the libellee filed his answer admitting the jurisdictional facts and denying the grounds set forth; on August 8, 1911, libellee filed a consent to a hearing of the case on that day and a hearing was had and a decree entered. This decree was set aside for the same reason as the decree in the Keohokalole case. Another hearing was had on the same pleadings on October 26, 1911, and another decree entered. In this case, as in the Keohokalole case, we will assume that no notice of the second trial was given to Clark—evidence on this point having been offered and refused by the trial judge. The evidence before the circuit judge showed that Clark accepted the benefits of the decree and remarried—this time to the intestate, to whom he was still married at the time of her decease. In this case, as in the Keohokalole case, the evidence taken at the second trial shows proof of all the jurisdictional facts. The case therefore stands on the same footing as the first discussed case. In this court, as in the lower court, two reasons are urged why these second decrees of divorce, in the Keohokalole and Clark cases, respectively, are void: (1) that no notice of the second trial in either case was given to libellee, and (2) that the setting aside of the original decrees of

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divorce made void all of the proceedings in the cases, and thereafter it was necessary to commence the cases anew.

As to the first ground, that libellee in neither of the cases above referred to had notice of the second trial, we are clearly of the opinion that this is not a jurisdictional defect which would render the decrees void. The circuit judge before whom the divorce cases were pending had jurisdiction of the subject matter, and jurisdiction of the person of the libellee had been acquired in each case by personal service. The fact that the first decree in each case was later vacated did not have the effect of divesting the court of its jurisdiction theretofore acquired. In 17 A. & E. Enc. L. (2d ed.) p. 1065, the distinction is pointed out between errors and irregularities rendering judgments voidable merely and jurisdictional defects which render the proceedings void. It is there said that "those defects which relate to the jurisdiction over the subject matter are generally of the class which render the proceedings void. On the other hand, there are few defects in the proceedings of a court of justice which render the proceedings void, in the strict sense of that word, where the court has jurisdiction of the subject matter of the suit." See also *State v. Richmond*, 26 N. H. (6 Foster) 232. In *Salter v. Hilgen*, 40 Wis. 363, the court held that "Where a circuit court, having jurisdiction of the subject matter of an action and of the parties, renders judgment for the plaintiff as for default of an answer, before the time for answering has in fact expired, the judgment is *irregular but not void*." In this Territory there is no statute requiring the giving of notice of trial. 38 Cyc. 1271. We hold that the proceedings had upon the second trial of the divorce cases were at most *voidable* and not *void*, and that the decrees entered in such cases, being valid on their faces, are not open to collateral attack in this proceeding.

We think there is no merit in the second ground urged

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by counsel, that the setting aside of the first decrees of divorce made void all of the proceedings in the cases, and necessitated the commencement of the cases anew. This contention finds no support in the *Markle* case, *supra*, that case having been remanded to the circuit judge with instructions to set aside the decree and for such further proceedings as might be appropriate. The circuit judge, having vacated the original decrees on the ground that thirty days had not elapsed after the completion of service of summons on the libellees, respectively, correctly treated the causes as still pending, proceeded to retry the same upon the evidence then adduced, and rendered the second decrees above referred to. 23 Cyc. 973, 974; *Kelly v. Harrison* (Miss.), 12 So. 261, 262.

It follows from what has been said that in our opinion the marriage of Henry N. Clark to intestate was a valid marriage, and intestate leaving neither child, father or mother, brother or sister surviving, her husband became and was her sole heir at law; also that evidence tending to prove who would have been the heirs at law of the intestate had she not left surviving her a lawfully married husband was immaterial to the issues.

The decree appealed from is affirmed.

A. A. Wilder (*Stanley & Wilder* on the brief) for appellant.

C. A. Long and N. W. Aluli for appellee.

Syllabus.

JONAH KUHIO KALANIANAOLE v. LILIUOKALANI, BY HER GUARDIAN AD LITEM, LORRIN ANDREWS; CURTIS P. IAUKEA, WILLIAM O. SMITH, AND SAMUEL M. DAMON, TRUSTEES; CURTIS P. IAUKEA, JOHN A. DOMINIS, NAKANE-ALOHA, ANAOLE, KELIIAKAHAI, MRS. KAMAKA VON OELHOFFEN, NAHEANA PAIA, HAKAUI AND KAINALU HIS WIFE; MARY K. KAHALEPUNA, S. K. MAHOE AND EMALIA HIS WIFE; AKI, SISTER OF MAHIAI ROBINSON, MRS. MARY AULD, MARY PAHAU, MRS. KALEHUA, GEORGE NAPAHELUA, AND GEORGE KAHILINAI, HIS SON.

No. 948.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED AUGUST 3, 1916.

DECIDED AUGUST 16, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*what constitutes final order.*

What constitutes a final decision or order for the purpose of appeal depends rather upon the nature and effect of the decision than on the stage at which it is rendered. An order determining that a respondent in a suit in equity alleged to be of weak mind and under the undue influence and domination of another may appear, and would be recognized, only through a guardian *ad litem* appointed by the court, the alleged weakness of mind and undue influence being controverted, is a final and appealable order.

SAME—*review of interlocutory rulings.*

An appeal from a final order in a suit in equity brings up for review all interlocutory rulings which affected the appellant, but not those which affected only a co-party who has not appealed, and which did not enter into the order appealed from.

INSANE PERSONS—*persons under undue influence—appointment of next friend or guardian ad litem.*

A next friend or guardian *ad litem* may be appointed for a

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person who, though not insane, is alleged to be weak minded and, because of the undue influence and domination of another, is not a free agent. But where an issue is raised by the party's denial of such weak mindedness and undue influence, that issue must be heard and determined *in limine* and before further steps are taken in the suit.

EQUITY—pleading—interest of complainant in subject matter.

A bill in equity is demurrable which does not show that the complainant has an interest in the subject matter of the suit. The next of kin of a living person has no estate or interest at law or in equity in the property of that person. *Nemo est haeres viventis.*

OPINION OF THE COURT BY ROBERTSON, C.J.

The record in this case shows, *inter alia*, that on the 30th day of November, 1915, Jonah Kuhio Kalanianaʻole, on his own behalf and as next friend of Liliuokalani (former Queen of Hawaii) filed a bill in equity averring mental weakness on the part of the Queen, and a conspiracy and undue influence on the part of the respondents Iaukea and Dominis, resulting in the execution by the Queen of a certain deed of trust, on the 2d day of December, 1909, under which the said Iaukea and Dominis were among the beneficiaries, and certain subsequently executed instruments purporting to confirm and supplement the trust deed. The prayer of the bill was that all said instruments and a certain power of attorney given by the Queen to said Iaukea be annulled and cancelled, and that the trustees be directed to reconvey and deliver the property described in the deed to the Queen. Upon the bill process issued by direction of the circuit judge. On December 16, Mr. Antonio Perry entered his appearance as attorney for the Queen, and, on December 30, filed, on her behalf, a discontinuance and motion to dismiss based upon the affidavit of the Queen "that the said bill of complaint herein was filed and the above entitled suit was instituted without her authority,

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consent or knowledge; that she has not since its institution in any way ratified the bringing or the maintenance of this suit; that she disapproves of its institution and its maintenance; and that she desires that the suit be terminated and dismissed." Thereupon counsel for the complainants filed motions to strike from the files the appearance of said Perry and the discontinuance and motion to dismiss filed by him on the ground that they were not "authorized by law or the facts and record in this case." On January 10, 1916, the respondents filed demurrers to the bill, and later moved for the removal of Kalanianaole as next friend of the Queen on the ground of interest. These several matters were argued by respective counsel, and on February 7, the circuit judge rendered his decision overruling the demurrers, denying the motions to strike from the files the appearance of counsel for the Queen and the Queen's motion and affidavit, but overruling her motion to dismiss the case, saying that he regarded her affidavit as a claim of mental capacity and an objection to the continuance of Kalanianaole as her next friend, and appointing Mr. Lorrin Andrews, an attorney of this court, as next friend in place of Kalanianaole, who was removed. On February 8, the Queen filed an affidavit entitled "Assertion of Mental Competency," as follows:

"Pursuant to the decision of the court filed herein on the 7th day of February, 1916, and the leave to amend therein granted, by way of supplement and amendment to her discontinuance and motion to dismiss heretofore filed herein, and not waiving her contention and claim that the said discontinuance and motion to dismiss are sufficient of themselves without this express denial of mental incompetency and assertion of mental competency, the above mentioned Liliuokalani, in whose name and behalf the above entitled suit purports to be brought by an alleged next friend, does hereby deny the truth of any and all charges, direct or indirect, that may be contained in the bill of complaint herein filed in the above entitled court and cause by Jonah Kuhio

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Kalaniana'ole in his own behalf and as her alleged next friend or that may be otherwise howsoever made herein, that she is or at the time of the institution of this suit was of unsound mind or mentally incompetent to protect her interests in this suit or in the property involved herein and does hereby claim and assert that at the time of the institution of the above entitled suit she was, ever since has been and now is of sound mind and mentally competent to terminate, withdraw and discontinue this suit and the bill of complaint herein, to do all things incidental to the preparation and prosecution of the discontinuance and motion herein filed by her, to protect all of her interests in this suit and in the property involved herein, to transact all other matters of business and to take all other action whatsoever.

"And all of this the said Liliuokalani is ready to prove and asks an opportunity to prove,—without waiving her claim that the burden is, not on her to prove her sanity or mental competency, but on anyone, who alleges that she is insane or mentally incompetent, to prove the said alleged insanity or mental incompetency.

"Liliuokalani.

"Dated, Honolulu, T.H.,
"February 8th, 1916.

"Territory of Hawaii,
City and County of Honolulu, } ss.

"The aforesaid Liliuokalani being first duly sworn, on oath deposes and says that she has read the foregoing document and knows the contents thereof and that the matters and things therein stated and set forth are true, of her own knowledge.

"Liliuokalani.

"Subscribed and sworn to this 8th day of February, 1916.

"W. J. Robinson

"Notary Public, First Judicial
Circuit, Territory of Hawaii."

(Notarial Seal.)

This was accompanied with a notice to counsel for the complainants that the court would be asked "to set a time for the holding of the inquiry into and the taking of evi-

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dence upon the question of my (the Queen's) mental competency to terminate the above entitled suit and to move to dismiss it and in these and other ways to protect my interests therein and in the property therein involved." On February 11, the Queen filed an "Objection and Protest" against any further proceedings being had in the case until after her mental competency to discontinue the suit and the force and effect of the discontinuance filed by her shall have been judicially inquired into and determined, asserting herself to be of sound mind and mentally competent to terminate the suit, and claiming that the court was without jurisdiction to take any steps in the cause other than to hold an inquiry as to her mental competency or to declare the suit dismissed. Upon this the circuit judge ruled that the position asserted by the Queen was not well taken, and held that while he would consider the claim of the Queen to mental competency he would not take it up preliminarily, but in connection with the other issues in the case. The Queen then applied to this court for a writ of prohibition to restrain the circuit judge from taking any further steps in the case until after making an inquiry into and determining the question of her present mental capacity. This court held that the presumption of competency prevailed in favor of the Queen; that she had the right to control the suit so far as she was concerned, and to discontinue the same as she had done; that upon the filing of the discontinuance she ceased to be a party to the suit; that having ceased to be a party, she was not entitled, under the statute, to maintain the writ; and that the circuit judge was not without jurisdiction to determine whether Kalanianaole could maintain the suit in his own behalf. In denying a motion for a rehearing this court took occasion to point out that the main suit was predicated upon the ground of undue influence which presupposes mental competency, and insanity was not averred in the bill. The Queen then filed a motion, based upon the ruling made by

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this court, that a decree be entered by the circuit judge declaring the suit to have been discontinued so far as the complainant Liliuokalani was concerned. On March 27, counsel for Kalanianaʻole moved for leave to amend the bill of complaint by adding the averment

"That at the time when said instrument, Exhibit A" (the trust deed) "was made and executed, and at all times since up to the time of this amendment, the said Queen was not of sound mind and was not mentally competent to make said alleged deed of trust (Exhibit A) and to make and execute the other instruments thereafter referred to in this bill, or any of them; and that she is not mentally competent to protect her interests in this suit or in the property involved herein, and to employ counsel, and to do all things incidental and necessary to the prosecution of the said suit, or any of these things, and that it is necessary that some proper person should be appointed as her next friend and guardian in this litigation,"

also to amend the prayer by inserting the clause

"That a next friend or guardian *ad litem* be appointed by this court for the said Queen, who shall act for and in behalf of the said Queen in this matter."

The court allowed the amendment to be made to the bill; granted the Queen's motion that she be dismissed as a party complainant; held that as she was a necessary party to the suit she should be made a respondent, and directed that the transposition be made; continued Mr. Andrews as guardian *ad litem* for the Queen; and said that the matter of Mr. Perry's authority to further appear in the case would probably be taken up thereafter. In the meantime Mr. Andrews, as next friend of the Queen, had reported to the court that, among other things, he had been informed by the Queen that she had not employed Mr. Perry to represent her. On March 30, Mr. Andrews, as guardian *ad litem*, filed a petition in which, after reviewing the proceedings had with reference to his appointment as next friend and as guardian *ad litem*, he stated,

"That your petitioner, after conversing with said Liliu-

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okalani and carefully examining a number of witnesses as to the alleged making of the trust deed in the year 1909, which is the subject of this controversy, and as to the present condition of said Liliuokalani, is satisfied that not only was the said trust deed as made and executed an improper and improvident deed, but that it is clear that said deed was not the act and wish of said Liliuokalani but due to the control exercised over her by others, and that at the time of the making of said deed she was in no physical or mental condition to make the same or understand the provisions thereof, and that she did not understand the provisions thereof; but that also her present condition is such that she is incapable of understanding the proceedings that are being carried on, or to guard her rights, or to act other than under the influence of those in whose control she is, and that she is incompetent to defend herself in courts of law in her proper person;"

and prayed that he be allowed to file, on the Queen's behalf the answer and cross bill attached to the petition, and to present proof of the allegations made therein. Thereupon the circuit judge made and entered an order confirming the appointment of Mr. Andrews as guardian *ad litem* for the Queen, and that he be allowed to file the answer and cross bill, and directing that the same be served upon the attorneys for the several respondents and upon the attorneys for the complainant within twenty-four hours, and that the respondents and complainant answer thereto within ten days after service. The answer and cross bill, which was filed, admitted and adopted all the averments contained in the amended bill of the complainant; averred that the Queen, at the time of the making of said deed of trust and other instruments, by reason of the progressive weakness of old age and her impaired mental faculties was not of sound mind or mentally capable of making said deed and other instruments or of understanding the contents and effect thereof; and was entirely under the influence and control of the said respondents Iaukea and Dominis; and prayed that said instruments be annulled and can-

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celled, and for a reconveyance by the trustees. On April 1, the Queen, through her attorney, Mr. Perry, filed a written waiver of service of the bill of complaint, and amendments thereto, of the said Kalaniana'ole, and of summons thereon, and entered her appearance in the suit as a party respondent; also a demurrer to the bill of complaint as amended on the grounds of lack of equity in the bill and that the said Kalaniana'ole has no interest in the subject matter of the suit. Similar demurrers were filed by other of the respondents. The Queen, by her attorney, filed also a motion to strike from the files the petition of the guardian *ad litem* for leave to file an answer and cross bill, the order confirming the appointment of the guardian *ad litem* and granting the leave asked, and the answer and cross bill of the guardian *ad litem*, on the ground, in substance, that the answer and cross bill, in effect, made the Queen a complainant contrary to her rights in the premises and her discontinuance theretofore filed, and in violation of the law and the decision of this court in the prohibition proceeding. On April 4, Mr. Andrews, as guardian *ad litem*, filed motions to strike from the files the waiver of service and general appearance, the demurrer, and the motion to strike from the files the answer and cross bill, etc., "signed and filed by one Antonio Perry, claiming to be attorney for said Liliuokalani," on the grounds that the record showed that he, the said Andrews, is the guardian *ad litem* of the Queen and had obtained permission to file said answer and cross bill on her behalf, and that the said Antonio Perry was not, is not now, and never has been the attorney for the Queen. A similar motion was filed by counsel for Kalaniana'ole, based on the ground that it appeared from the record that said Andrews had been duly appointed as guardian *ad litem* of the Queen, and said Perry was not entitled to file said papers. On the same day argument was had on these several motions and demurrers. Mr. Perry urged, among other things, that the

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so-called appointment of Mr. Andrews as guardian *ad litem* of the Queen was ineffectual in view of the assertion of the Queen, theretofore made, of her mental competency and right to control her own case, and offered to produce testimony to show that he had been employed by the Queen personally to act as her attorney in the case. The circuit judge ruled that the issue as to the Queen's mental condition would be allowed to stand and that it would be tried under the allegations of the bill of complaint, but that the Queen was under guardianship and had no right to appear independently of the guardian *ad litem*, and that Mr. Perry had not been employed by the Queen and could not appear for her and interfere with the guardian *ad litem*, also that Mr. Perry had no right to file the papers filed by him on behalf of the Queen. On the following day the circuit judge filed his rulings in writing, sustaining the motions of the guardian *ad litem* and the complainant, and striking from the files the papers filed by Mr. Perry as attorney for the Queen, and overruling the demurrers of the respondents.

The case comes to this court upon an appeal perfected by the Queen. The first question to be determined is whether the appeal lies. This point is intimately connected with the next one to be taken up, that is, whether the question of the Queen's present status should be inquired into and determined *in limine*. Counsel for the complainant contend that no final order was made by the circuit judge and that the appeal should therefore be dismissed. The statute provides that "Appeals shall be allowed from all decisions, judgments, orders or decrees of circuit judges in chambers, to the supreme court, except in cases in which the appellant is entitled to appeal to a jury." R. L. 1915, Sec. 2508. The uniform construction of this provision has been that to be appealable the order or decree in question must have been a final one. But this construction has been

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applied with appropriate liberality, and appeals from orders final in their nature, though not determinative of the whole case upon its merits, as well as from final decrees in the strict sense of the term, have been entertained by this court. "The statute does not expressly confine appeals to *final* judgments, orders and decrees, but it has been so construed by this court in numerous cases. And yet this court has also recognized that a final decision for the purpose of appeal is not necessarily the last decision in the case and that its nature and effect rather than the stage at which it is rendered is the true test." *Dole v. Gear*, 14 Haw. 554, 566. See *Barthrop v. Kona Coffee Co.*, 10 Haw. 398, 400; *Humburg v. Namura*, 13 Haw. 702, 705; *Estate of Enos*, 18 Haw. 542, 546; *Scott v. Stuart*, 22 Haw. 641. In the case of *Eau Claire v. Payson*, 107 Fed. 552, 557, the court said, "The supreme court has not placed upon the words 'final decree,' respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction." In *Estate of Silva*, 15 Haw. 13, it was held that an order may be final as to one party and appealable by him though the case be not determined as to other parties to the suit. Also, it is held, an order which determines and disposes of the rights of the parties with reference to a material portion of a case, or a matter distinct from the general subject of the litigation, is generally to be regarded as a final order. *Honolulu Athletic Park v. Lowry*, 22 Haw. 733, 738; *Williams v. Morgan*, 111 U. S. 684, 699; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 224. And in *May v. Hardin*, 52 Ky. 344, it was held that an order determining, *in limine*, a question as to who had the right to the control of the suit and its proceeds, as it materially affected the rights of the parties and was obviously prejudicial to the party against whom the question was decided, was a final order.

In the case at bar, after the Queen had been made a

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party respondent, she appeared through the attorney who claimed to have been employed to represent her, and interposed a demurrer to the bill of complaint. The guardian *ad litem* moved to strike the appearance and demurrer from the files on the ground that he alone was authorized to represent the Queen and that Mr. Perry was not and never had been her attorney in the suit. The circuit judge ignored Mr. Perry's offer of his own and other testimony to show that he had been directly employed by the Queen; held that he had not been so employed, and that the Queen could not appear in the case independently of the guardian *ad litem*; and sustained the motions of the guardian *ad litem*, also the similar motion of the complainant. The circuit judge held in a vague sort of way that the issue as to the present mental condition of the Queen would be tried "under the allegations of the complaint," but how and by whom it was to be tried was not made clear. It would seem that the answer and cross bill which the guardian *ad litem* had been allowed to file on behalf of the Queen, which admitted all the allegations of the complainant's bill and affirmatively set up her present incompetency to act for herself had effectually eliminated from the case the very issue which the assertion of competency previously made by the Queen through Mr. Perry was supposed to have raised. It is clear that the effect of the rulings of the circuit judge was to deny the Queen the right to appear in her own behalf, and to recognize her as a party only through the guardian *ad litem*, the validity of whose appointment and right to represent the Queen was purportedly, at least, attacked by the Queen herself. The issue as to whether the suit so far as the Queen was concerned was to be controlled by the guardian *ad litem* or by the Queen through counsel of her own choosing was a vital one and it was definitely disposed of by the rulings made.

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We hold that the order was final and that this appeal should be entertained.

The next point is as to whether the question as to the present status and condition of the Queen should have been taken up and decided by the circuit judge before any further steps were taken, and whether he was in error in postponing its consideration. We have found little in the books, other than dicta, which throws light on the subject, though upon principle the answer seems clear. Counsel for the complainant contend that it was within the discretion of the circuit judge to take the matter up *in limine* or to consider and pass upon it in connection with the proofs upon the merits of the case. They refer to the cases of *Lindly v. Lindly*, 109 S. W. (Tex.) 467, 102 Tex. 135; *Holland v. Riggs*, 116 S. W. (Tex.) 167; *Kroehl v. Taylor*, 69 N. J. E. 525; *Smith v. Smith*, 106 N. C. 498; *Snowden v. Smith*, 119 S. W. (Ky.) 785, and other cases. In the *Lindly* case the court of civil appeals said, "It was a matter of discretion with the trial court as to whether he would inquire into the mental condition of Sally Lindly *in limine*, or hear the evidence, and submit the question to the jury along with the other issues in the case," but there was no discussion of the principle involved either by that court or the supreme court of Texas. We think the other cases cited do not go to the full extent of sustaining the contention made in the case at bar. Counsel for the Queen repeatedly urged in the court below that the issue having been raised by the Queen's assertion it should be considered and decided *in limine*, and he now contends that the refusal of the circuit judge to adopt that course was reversible error. The contention would apply with equal force whether the Queen be a complainant or a respondent. In the case of *Howard v. Howard*, 87 Ky. 616, 622, the court said,

"The law presumes all persons to be of sound mind, and

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if adults, capable of managing their own affairs; and the mere fact that it is alleged by a person styling himself next friend, that a particular individual, who is an adult, is of weak or unsound mind, and not capable of taking care of his own affairs, does not destroy that presumption. But where the action is brought in the name of the person alleged to be of weak or unsound mind, by his next friend, against parties having an interest in the subject-matter, it is to be presumed, in the absence of anything appearing to the contrary, that whatever consent such person is capable of giving to the bringing of the action has been obtained; and that it is in fact his suit, for it is really in his name; and that he has obtained the consent of a friend, as the most competent person by whom he wishes his case to be conducted, in order that his rights may be the better protected. But if he makes known to the court that it is not his suit; that he is competent to take care of his own affairs; that the supposed friend is in fact an intermeddler, the court in such a state of case is presented with the question: What is the proper course to pursue?"

And it was pointed out that the question should be determined *in limine*. That case was referred to with approval in *Isle v. Cranby*, 199 Ill. 39, 47. In *Whetstone v. Whetstone's Ex'rs.*, 75 Ala. 495, 501, the court said,

"We have said that the right of a mere volunteer to institute a suit as next friend of a non-adjudged non compos rests under limitations. * * * The welfare and interest of the alleged non compos are matters of prime, dominating importance, and should receive the careful consideration of the court, before the litigation is allowed to progress. These preliminary inquiries should be first instituted; and to this end the chancellor may require the verdict of a jury, or a report from the register, so as to properly inform his conscience."

See also *Campbells v. Bowen*, 1 Rob. (Va.) 241; *Lee v. Ryder*, 56 Eng. Reprint 1103; *Denny v. Denny*, 8 Allen 311. Doubtless an *ex parte* allegation of insanity or mental incompetence, or of mental weakness and undue influence destroying free agency, would warrant a court in appoint-

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ing a next friend or guardian *ad litem*. But such would not be the case where, at the time of the purported appointment, the party in question has placed before the court a denial of such incompetency, nor would it justify the court in continuing an appointment previously made after such denial has been interposed, except upon adjudication of the fact of incompetency after a judicial inquiry. It would present an intolerable situation that a party litigant should be represented by a next friend or a guardian *ad litem* on the theory that he is incompetent, and also by an attorney of his own selection on the theory that he is competent, each representative filing inconsistent pleadings and insisting on conducting the case as he should deem best. Upon principle there would seem to be no room for the theory that the trial judge has the discretion to decide the issue as to the party's competency in connection with the merits of the case for the question would not down as to which of the representatives should be allowed to frame the issues and conduct the case or discontinue it. If the party be in fact competent he is entitled under the law to appear in person or through a representative of his own choice, and if he be in fact incompetent his only representative should be the appointee of the court. The obvious answer to all this is that when in any case the alleged incompetency is denied by the alleged incompetent the court must hear and determine the issue *in limine* and before further steps be taken in the cause. We hold that the circuit judge erred in not taking that course in this case. Here, the error was emphasized by the fact that the circuit judge, while expressly declining to make a finding as to the Queen's present status or condition, permitted the guardian *ad litem*, who could have a standing in court only in case the Queen be in fact incompetent, to file an answer and cross bill averring her incapacity, the legal effect of which was to supplant her former assertion of competency.

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Though the Queen is the sole appellant in this case, counsel for the trustees and most of the other respondents have appeared and argued that as an appeal from a final order or decree brings up for review all interlocutory rulings made in the court below they are entitled to be heard upon their demurrers which, it is contended, were erroneously overruled by the circuit judge. They cite the cases of *Scott v. Stuart*, 22 Haw. 641, and *Lee Chu v. Noar*, 14 Haw. 648, which are authority for the proposition that upon an appeal from a final order or decree by a sole party all interlocutory rulings are reviewable. But they are not authority for the contention that upon the appeal of one party interlocutory rulings which adversely affected a co-party who has not appealed and is not in a position to appeal, and which did not enter into the order appealed from, may be reviewed. Nor have we been referred to any authority which so holds. We are of the opinion that the rulings upon the demurrers of the respondents are not now before us, though they will be disposed of by what we have to say.

Counsel for the Queen further urges that, in the event that this court shall sustain the appeal and find reversible error in the record, and if it should be of the opinion that the demurrer of the Queen to the bill of complaint ought to be sustained, it would be appropriate for this court to so express itself, especially as the circuit judge, when striking the demurrer from the files, had stated that he otherwise would have overruled it. And counsel points out that if this court should believe that the demurrer ought to be sustained a long, expensive and useless trial might be obviated by making a ruling in accordance with his contention that Kalanianaole, as sole complainant, is not entitled to maintain the suit since he has no interest in the subject-matter thereof. We think this position is sound. As, upon the views above expressed, there must be a reversal and further proceedings, we believe that we should

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fall short of doing our full duty in the premises, if, being of the opinion that the bill should be dismissed, we failed to so state.

The property conveyed is averred in the bill to be that of the Queen, and the prayer is that it be reconveyed to her. There is no averment that the complainant has any present interest in the property, but merely that he is the Queen's "only next of kin and heir at law." It is elementary that in order to maintain a suit in equity the complainant must have an interest in the subject-matter of the suit, and that a bill is demurrable which fails to show such interest. *Palau v. Heleman Land Co.*, 22 Haw. 357; 1 Beach, Mod. Eq. Pr., Sec. 261. The next of kin of a living person has no estate or interest at law or in equity in the property of that person, and may never have any, for the owner may dispose of the property during his lifetime or devise it to others by will. The next of kin may not outlive the owner of the property. "The title of an heir is called into existence by the *death* of the ancestor, for *nemo est haeres viventis*." 3 Washburn, Real Prop. (4th ed.), 6. And until the ancestor dies the heir apparent or presumptive has nothing more than a mere possibility, expectancy or hope of succession unfounded in any legal act whatever. 22 Am. & Eng. Enc. Law (2d ed.) 1034. See *Dursley v. Fitzhardinge*, 6 Ves. 251, 260; *Allan v. Allan*, 15 Ves. 130; *In re Parsons*, L. R. 45 Ch. Div. 51, 57; *In re Bartles*, 33 N. J. E. 46; *Youngs v. Heffner*, 36 Oh. St. 232, 238. The case of *Sellman v. Sellman*, 63 Md. 520, was a suit to set aside a conveyance made by a feeble minded person under the undue influence of the grantee. The complainants were the children and grandchildren of the grantor. A decree sustaining a demurrer and dismissing the bill was affirmed, the court saying (p. 522),

"It is a fundamental principle of equity pleading that, to entitle a party to sustain a bill, he must show an interest

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in the subject of the suit, or a right to the thing demanded, and proper title to institute the suit concerning it; and if such interest or right to sue be not fully shown by the bill itself, the defendant may demur. * * * And this being the requisite in pleading, the complainants, upon the maxim *nemo est haeres viventis*, can have no standing in court; for that maxim is of equal force in equity as at law. The children and grandchildren of a living ancestor cannot claim a right or maintain a suit in respect to the property of that ancestor, while their interest in such property is merely in expectancy, depending upon a future inheritance that, by possibility, may never occur. The principle is, both at law and in equity, that no one is entitled to be recognized as heir until the death of the ancestor, or the person from whom the descent may be cast; and the fact that such ancestor or other person may be alleged and admitted to be *non compos mentis*, or otherwise incapable of managing his estate, makes no exception to the general principle." See also *Bradford v. McKenzie*, 43 Atl. (Md.) 923.

We think it is clear, therefore, that Kalaniana'ole, as sole complainant, may not maintain the suit since he has no interest in the subject-matter.

Having gone this far, we are impelled to go further. We believe that some of the mistakes which have been made in this case have resulted from an error made by this court. In discharging the temporary writ of prohibition which the Queen had sued out we held—and properly so—that the bill of complaint did not aver insanity on the part of the Queen, but mental weakness and undue influence which presupposes mental competency; but we erred in holding that the Queen was therefore entitled to discontinue the suit as she had done. The writ was properly discharged since the circuit judge was not proceeding without jurisdiction, but our reasoning did not reach the root of the matter. It was averred in the bill that the Queen is of the age of seventy-seven years; that her memory has been seriously impaired by bodily infirmities, worry and anxiety; that the

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respondent Iaukea was her business agent and personal friend upon whom she relied for advice; that the respondent Dominis is a young man who was brought up in the Queen's household; that the said Iaukea and Dominis conspired together to obtain a disposition by the Queen of her property in such form as they might profit thereby, and procured the execution of the deed of trust in which they and others are named as beneficiaries; that the deed of trust and other instruments mentioned in the bill did not and do not express the wishes and desires of the Queen, and were not and are not her free and voluntary act and deed; that at all the times mentioned in the bill said Iaukea and Dominis have unlawfully and fraudulently conspired and confederated together for the purpose of obtaining control of the property and person of the Queen and of imposing their wills upon her, and have prevented and do now prevent her from obtaining the advice of loyal friends; and that by reason of the undue and improper influence exerted over the Queen by said Iaukea and Dominis she is in fear; and under the absolute domination of them and cannot now act freely and independently. The charge, therefore, was not of mental incompetency, but of a weakened mind which had been, and is being, subjected to the domination of the said respondents. It was not enough to say that the presumption of sanity or mental competency prevailed in favor of the Queen, for if, at the time this suit was instituted, she, though sane, was still subject to the same domination under which, it is averred, she executed the deed of trust, and was not a free agent, the suit could be brought and maintained in her name and behalf by a next friend appointed by the court. That is to say, if the fact be that the execution by the Queen of the deed in question was procured in the fraudulent manner set forth in the bill, she could now, if a free agent and mentally competent, maintain such a suit as this in her own right and be-

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half, and if she is not now a free agent because of the undue influence and control of others the same relief may be sought in her name and behalf by a next friend. "Where persons are incapable of acting for themselves, although not strictly either idiots or lunatics, the suit may be brought in their name, and the court will authorize some suitable person to carry it on as their next friend." Story, Eq. Pl., Sec. 66. See also 3 Pom., Eq. Jur., Sec. 1314; *In re Kronberg*, 208 Fed. 203; *Edwards v. Edwards*, 36 S. W. (Tex.) 1080; *Lamb v. Lamb*, 23 Atl. (N. J.) 1009; *Wilson v. Oldham*, 51 Ky. 55; *Sumner v. Perry*, 11 Haw. 372. Although the "Assertion of Mental Competency" filed by the Queen seemed to assume that mental incompetency was averred in the bill, as counsel for Kalanianaole have contended it was, that paper and the "Objection and Protest" filed by her sufficiently challenged the averments of existing undue influence and control on the part of Iaukea and Dominis, and lack of free agency on the part of the Queen, so as to raise an immediate issue in regard to the Queen's condition and status at the time of the filing of the bill. And that issue should have been judicially inquired into and determined by the circuit judge, as we have seen, before any other issues were framed or other steps taken. And in this connection we may state that Kalanianaole was not an improper person to act as next friend of the Queen on the ground of having a supposed adverse interest.

The appointment of Mr. Andrews as guardian *ad litem* was not authorized as the facts upon which the authority of the court to make such an appointment depended were in controversy and remained undetermined. The answer and cross bill filed by the guardian *ad litem* should have been stricken from the record. The Queen was dismissed as a complainant and made a party respondent at the time that the amendment to the bill purporting to aver mental incompetency in the Queen was allowed. And assuming

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that that averment could be held to be one of fact, and not a mere conclusion of law, it is to be regarded as the averment only of Kalaniana'ole who is not a proper party to the suit.

The circuit judge may entertain an application by some one asking leave to act as next friend of the Queen for the purpose of having her reinstated as the complainant in the case under the original bill, and, in that event, the question as to her present status and right to control the suit, or whether a next friend should be appointed for her, should be heard preliminarily.

The ruling and order appealed from is reversed, and the cause remanded to the circuit judge for further proceedings not inconsistent with the views expressed in this opinion.

D. L. Withington (*Castle & Withington, Thompson, Milverton & Cathcart* and *J. Lightfoot* with him on the brief) for complainant.

Antonio Perry for Liliuokalani.

L. Banigan (*Smith, Warren & Sutton* on the brief) for Wm. O. Smith, et al, trustees.

TERRITORY *v.* WILLIAM L. PETERSON.

No. 941.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED AUGUST 7, 1916.

DECIDED AUGUST 17, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CRIMINAL LAW—*usury*.

The offense prohibited by Sec. 3444 R. L. is committed by

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receiving interest in excess of the rate of two per cent. per month, and not by entering into a contract whereby the defendant is to receive interest at a rate greater than two per cent. per month.

INSTRUCTIONS—*eliminating questions of fact.*

An instruction in a prosecution for receiving usury, which makes the guilt of the defendant to depend upon the value of a note and securities taken by the defendant to secure the loan, and which eliminates from the consideration of the jury the question of fact as to whether or not the defendant actually received interest at a rate greater than that permissible under the statute, constitutes reversible error.

CRIMINAL LAW—*principal—accessory before the fact.*

Under Sec. 3674 R. L., and Sec. 3807B, added to the Revised Laws by Act 215 S. L. 1915, one who aids in the commission of an offense or is an accessory before the fact may be charged and punished as a principal and in the same manner and to the same effect.

EVIDENCE—*prosecution for receiving usury.*

In a prosecution for receiving interest at a rate greater than two per cent. per month, where a note, bill of sale and an order were given to secure the loan, it is proper to admit in evidence such written instruments, and other pertinent evidence, for the purpose of showing the transaction between the parties.

SAME—*same—application of payment.*

It is proper to admit evidence of payments to the defendant and the application of such payments when the defendant is tried upon the charge of receiving interest at a rate greater than two per cent. per month.

CRIMINAL LAW—*usury—securities for loan.*

When money is loaned at a rate of interest greater than two per cent. per month the offense punishable under Sec. 3444 R. L. is not committed merely by taking securities for the loan; the acceptance of security for the loan is not the receiving of interest, discount or consideration upon the loan within the meaning of the statute.

OPINION OF THE COURT BY QUARLES, J.

The defendant was prosecuted in the circuit court of the first circuit upon an information wherein he was charged as follows:

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"That on or about towit the 4th day of September, A. D. 1915, in the City and County of Honolulu, Territory of Hawaii, William L. Peterson did commit the offense of usury, in that he, the said William L. Peterson, did receive from one Isaac D. Iaea interest, discount and consideration, at a rate greater than two (2%) per cent. per month upon a sum of money, towit the sum of ninety dollars (\$90) theretofore loaned, and advanced by him, the said William L. Peterson to the said Isaac D. Iaea, contrary to section 3444, Revised Laws of Hawaii, 1915."

To the said complaint the defendant filled a motion to quash upon the following grounds: "(1) That it is not alleged in said complaint at what time said loan was made by defendant. (2) That neither the rate of interest nor the aggregate amount of the interest which defendant is charged as having received is alleged in said complaint. (3) That there is no allegation in said complaint that the defendant received interest greater than two per cent. per month in pursuance of any agreement made with any person. (4) That said complaint sets forth conclusions only and does not set forth facts sufficient to constitute any offense under the laws of said Territory." The said motion to quash was denied, to which the defendant excepted. Thereupon the defendant was called to plead and entered a plea of not guilty. The cause was tried before a jury and the defendant convicted and adjudged guilty. The defendant moved for a new trial upon a number of grounds, not necessary to be set forth, the principal grounds being involved in the consideration of his exceptions. The cause comes before us on exceptions, fifty-two in number.

The evidence shows that one Isaac D. Iaea, a police officer, went to the defendant to borrow \$100; that defendant told him that he would get the money and to come back later; that later defendant let Iaea have \$90, took his note, due three months after date, for \$130 payable to E. Markle, took from said Iaea a bill of sale of a certain automobile in

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the name of E. Markle, and had said Iaea sign an order on the city and county auditor for warrants of \$10 each, one payable each pay day—semimonthly—amounting in the aggregate to \$60, the order being given to the defendant and the said warrants to issue to him. Warrants were issued against the salary of said Iaea as police officer to the extent of \$60 to E. Markle who held a power of attorney from defendant. No further payment was made upon the loan. Iaea testified that the agreement was that the bill of sale was security for the payment of the note, which, after deducting the \$60 payable by warrants against his salary, was to be paid from earnings of the automobile. Markle testified that he furnished the money and that it was agreed between himself and defendant that they would divide the interest between themselves. This is denied by the defendant. Markle testified that of the \$10 withheld by the defendant out of the loan, the defendant gave him \$5, claiming it to be interest on the loan. Defendant denied this statement. Markle testified that out of the money received for the warrants he paid the defendant \$9, part of the interest on the loan. This statement is also denied by the defendant. No payments were endorsed on the note and there is no evidence in the record showing how the \$60 collected on the salary warrants was applied other than the inference from Markle's statement that he gave \$9 to defendant as part of the interest on the loan.

We do not deem it necessary to consider the exceptions *seriatim*, and we will only discuss some of them specially, treating the questions raised by the other exceptions in a general way. The important exception is to the charge of the court to the jury. In its charge the court, *inter alia*, instructed the jury as follows:

"Now, gentlemen, I think you are to be congratulated upon one thing, which is this: That there is no substantial discrepancy in the evidence upon those certain features

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which the court will instruct you are the main, ruling and controlling features of the transaction now under investigation. It has been explained to you or declared to you by one of the attorneys, the attorney for the prosecution, in these words,—and I adopt his words to this extent,—if you believe the evidence of Iaea, the defendant is guilty and should be convicted. If you believe the evidence of Markle, the defendant is guilty and should be convicted. If you believe the defendant's own testimony, he is guilty and should be convicted. The discrepancies are with reference to side issues. The main issues are these: First, did the defendant make an advance of money; did he hand, pass over, transmit money to the extent of \$90., to Iaea, by way of a loan? If he did, then did he, either directly or indirectly, receive from Iaea interest, discount or consideration at a rate greater than two per centum per month?

“Now, to begin with, I instruct you that it makes no difference in the world whose money it was that the defendant advanced to Iaea, if you believe his own testimony, as well as those of the other witnesses, that he did advance it; and I use this word ‘advance’ to mean pay over, transmit from hand to hand. He may have been acting as an agent or broker for Markle, but whether he was or not makes no difference with regard to his own liability and his own guilt if, by his actions and in connection with that transaction, he transgressed the law. You can readily see, gentlemen, that it would be intolerable to hold that one person can send another person to commit a legal offense and that the person who is sent to do it and does it, shall not be punished, simply because he is acting as the agent or the servant of another person. Now, the second element is, the receipt of something by the defendant,—some interest, discount or consideration, to an extent exceeding two per cent a month. The evidence of all three of those witnesses is that the defendant, then and there and as a part of the transaction, received three certain documents, one of them Exhibit ‘A’ in this case, being what purports, on its face, to be an absolute bill of sale, with covenants of warranty of title by Iaea to Markle of a certain automobile therein described, and that automobile has been testified by Iaea to have been, at that time, worth between—according

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to my recollection—between six hundred and seven hundred dollars, or perhaps it was between \$700 and \$800. Now, if you believe that the defendant received this document, Exhibit 'A', as a part of that transaction, as the consideration or a part of the consideration for the advance or payment or transmission to Iaea of the sum of \$90., and if you further believe that the automobile referred to in this document, Exhibit 'A', was then and there worth more than \$90., plus three months interest on \$90. at the rate of 2 per cent per month, which, according to my mental computation, would be \$5.40,—in other words, if you believe that, at the time of taking and receiving this document, Exhibit 'A', from Iaea, the automobile in question was worth more than \$95.40, then I instruct you that that of itself would be the receipt of a consideration by the defendant, for the loan in question, at a rate exceeding two per cent per month, and would subject him to conviction, and if you believe that, he should be convicted.

"Again, it is in evidence, on the part of all three of those witnesses whom I have named, the defendant among them, that at the time mentioned and as a part of that transaction, the defendant took and received from Iaea this promissory note, Exhibit 'B', it calling for the payment, three months after date, to E. Markle or order, of the sum of \$130 together with interest at one per cent per month. If you believe, gentlemen, that that document was at the time worth more than \$95.40, then that of itself would sustain the charge and it would be your duty to find him guilty, but more particularly if you believe that that document, taken in conjunction with the so-called bill of sale, which has sometimes, upon this trial, been referred to as a security for the payment of this note,—if you believe that the two together were worth more than \$95.40, then you should find the defendant guilty.

"At the same time it is in evidence and admitted by the defendant that he took and received from Iaea this document, Exhibit 'C', which has been referred to as the order upon the auditor, for the delivery of warrants, some six warrants upon different dates, six different dates, for the payment of \$10 each, in the ultimate and aggregate sum of \$60. If you believe that these three documents, taken to-

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gether, were at the time worth more than \$95.40, it is your duty to convict the defendant."

The theory of the trial court that taking the note, the order for the warrants and the bill of sale as security, if either or all of said instruments were of the value of more than \$95.40, constituted the offense charged, is erroneous. Section 3444 of the Revised Laws is as follows:

"Any person who directly or indirectly receives any interest, discount or consideration for or upon the loan or forbearance to enforce the payment of money, goods or things in action, greater than two per centum per month, shall be guilty of usury, and punishable by imprisonment for a term not exceeding one year, or a fine not exceeding two hundred and fifty dollars or both."

Under statutes similar to the one for a violation of which the defendant is prosecuted it is generally held that the offense is committed by actually receiving usurious interest, and not by merely entering into an usurious contract (*Henry v. Bank of Salina*, 5 Hill (N. Y.) 523; 29 Am. & Eng. Ency. of Law (2d ed.) 559, 596; *Gillespie v. State*, 6 Humph. (25 Tenn.) 164; *Murphy v. State*, 3 Head (40 Tenn.) 248; *State v. Haney*, 130 Mo. App. 95). The gist of the offense is the receiving of the usurious interest. The offense may be committed although the principal of the loan is not paid (*State v. Davis*, 73 S. E. 130), and may be committed at the time of making the loan or at any time thereafter. It is the act of receiving the usury, not the intent to violate the law, that constitutes the offense. The intent is not an element of the offense (*State v. Haney*, 130 Mo. App. 95).

In that portion of the charge quoted above the jury were told that if they believed the evidence of the prosecuting witness Iaea they should convict the defendant; and if they believed the evidence of Markle they should convict the defendant; and if they believed the evidence of the defendant they should convict him, provided

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they believed the note, bill of sale and order, or any of them, were of the value of more than \$95.40. This was tantamount to an instruction to convict the defendant and evidently based on the theory that the note, being negotiable and secured by the order for the warrants and bill of sale, if of the value of more than the amount of the loan plus interest for the three months at two per cent., constituted the offense. As we have shown, this is not the law, hence the motion for a new trial should have been granted in the court below; and, not having been granted, the verdict and judgment thereon must be set aside and a new trial ordered.

One of the grounds of the motion for a new trial was that the court erred in denying defendant's motion to quash the information. The motion to quash has been held not a proper subject of exception, the remedy being by demurrer or motion in arrest of judgment (*The King v. Kumuhua*, 5 Haw. 621). Irrespective of the rule announced we think that the information substantially followed the language of the statute and would be good against a demurrer if the motion to quash could be treated as a demurrer (*Republic v. Ah Cheong*, 10 Haw. 469). The date of the loan being immaterial, the offense consisting in receiving the usurious interest, it was not necessary to state the date of the loan in the information. The information alleged that defendant received usurious interest at a rate greater than two per cent. per month. The failure to state the exact rate of interest was not ground for demurrer. A motion for a bill of particulars or a motion to make the information more specific may have been proper, but it is not necessary to decide this point. The information having charged that the defendant received usurious interest at a rate greater than two per cent. per month "upon a sum of money, towit the sum of ninety dollars (\$90) theretofore loaned, and advanced by him, the said William L. Peterson to the said

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Isaac D. Iaea," following the language of the statute, was sufficient without alleging in the information or charge that the usurious interest was received pursuant to an agreement. Again we suggest that the information or charge might have been made more specific. The allegation in the information that defendant received interest from said Iaea at a rate greater than two per cent. per month was not a conclusion but the statement of a fact and not ground for demurrer or motion to quash. Act 215 S. L. 1915, adding section 3791E to the Revised Laws, is as follows:

"No indictment or bill of particulars is invalid or insufficient for the reason merely that it alleges indirectly and by inference instead of directly any matters, facts or circumstances connected with or constituting the offense, provided that the nature and cause of the accusation can be understood by a person of common understanding."

The defendant has excepted to numerous actions of the trial court as improper and prejudicial to the defendant but we do not consider it necessary to examine them in detail. It is the duty of a trial judge to demean himself in the way that the law intends—to act as a fair and impartial arbiter between the parties—taking sides with neither, and abstaining from remarks and actions that will tend to impress the jury with the idea that he is anxious to see one or the other side succeed. Juries are wont to bring in the verdict that the judge seemingly desires that they should find, hence nothing should be done which indicates the verdict that the court thinks or desires should be found by the jury, and this is especially true in a criminal case.

Some of the exceptions are to the refusal of the trial court to instruct the jury that they must believe from the evidence that the defendant made the loan as principal and that they cannot convict him if they believe under the evidence that he was the agent of the lender of the money and only acted as agent in the transactions involved. There was no error in that regard. Under the provisions of section

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3674, R. L., and section 3807B, R. L., adopted in Act 215, S. L. 1915, if the defendant aided in the commission of the offense or was an accessory before the fact he is punished as a principal in the *same manner and to the same effect* as a principal.

It was proper to admit in evidence the note, bill of sale and order for warrants, all of them having been identified and their execution and delivery proven, and all other facts showing fully the transactions between the parties. It was proper to admit evidence proving the retention of the \$10 by the defendant for the same purpose. It was proper to admit evidence showing the collection of the warrants, and evidence showing their application is also proper. It is well established that a debtor, when he makes a payment, may direct how the payment shall be applied, failing which the creditor may make the application; and if neither makes an application of a payment or payments made the law will make the application so as to benefit and not injure the debtor. The defendant being under the protection of the presumption of innocence, the law will not, in a case of this kind, apply a payment to the satisfaction of usurious interest, and will, if no application is made by either party, apply the payment to the principal. The application of the money received from the orders was material and important. If any of it was received as usurious interest, either by the defendant Peterson or by Markle, whom he was aiding and assisting in the matter, the offense was committed, and was complete. These are questions of fact to be determined by the jury under proper instructions. The question of the defendant's guilt, so far as every material fact is concerned, must be determined by the jury (*People v. Young*, 138 N. Y. S. 50).

The disputed fact as to whether the \$10 retained out of the sum advanced to the defendant by Markle to lend to Iaea was applied by defendant and Markle to interest on

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the loan, or applied by defendant in payment of his services as a broker in the matter, was a question of fact which should have been left to the jury for their determination under proper instruction. If the \$10 was retained as interest, directly or indirectly, and applied as such on the loan in question, it was the receiving of interest in excess of two per cent. per month for the time of the loan and would be sufficient evidence upon which to base a verdict of guilty; but if retained by defendant with the consent of Iaea, as a fee for services, and not interest, its retention would not constitute the offense charged. These are questions which should have been decided by the jury. By its charge the trial court, in effect, took from the consideration of the jury every question except that of the value of the note, order for warrants and bill of sale, singly and in the aggregate, and instructed them to find the defendant guilty if they found the value of the said note, order and bill of sale, singly or in the aggregate, to exceed \$95.40. This was error.

Other exceptions raise questions which will probably not arise on another trial, hence we do not consider them.

The exceptions are sustained and the case remanded to the circuit court with instructions to set aside the verdict and judgment and grant the defendant a new trial and for further proceedings consistent with the views herein expressed.

W. T. Carden, Second Deputy City and County Attorney (*A. M. Brown*, City and County Attorney, with him on the brief) for the Territory.

C. F. Peterson (*J. A. Magoon* with him on the brief) for defendant.

Syllabus.

B. VON DAMM, ET AL., v. D. L. CONKLING,
TREASURER OF THE CITY AND COUNTY OF
HONOLULU.

No. 960.

SUBMISSION WITHOUT ACTION.

ARGUED AUGUST 14 AND 15, 1916.

DECIDED AUGUST 24, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CONSTITUTIONAL LAW—*municipal corporations—taxation by special assessment.*

A statute providing that the cost of a highway improvement shall be assessed against the lands benefited by the improvement cannot be said to provide for or constitute a taking of private property for public use without just compensation or without due process of law because it does not expressly provide that the amount of an assessment shall not substantially exceed the special benefit conferred. Much latitude must be left to the legislature in determining the method of assessment, and a statute can be successfully called in question only when it is so devoid of any reasonable basis as to constitute an arbitrary abuse of power.

MUNICIPAL CORPORATIONS—*indebtedness—bonds payable only out of special fund.*

The issuance of bonds payable only out of a specific fund raised by a special tax for a public improvement does not constitute municipal indebtedness within the meaning of fundamental limitations upon such indebtedness. That a contingent future liability on the part of the municipality may exist in connection with such issuance does not alter the rule.

SAME—*proceedings under improvement statutes—special assessments.*

Where a statute authorizes highway improvements to be made at the cost of property specially benefited upon assessments levied according to area or frontage, one improvement district may include a combination of improvements, and the assessment as to some be made according to area and as to others according to frontage.

SAME—*public contracts—time limit for execution of contract.*

The provision of R. L. 1915, Sec. 1798, that no bid for a contract

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for a highway improvement shall be considered unless accompanied by a certified check payable to the city and county, which check shall be forfeited unless the bidder shall sign the contract and furnish an approved bond within ten days after the contract is awarded, held to be a provision for the benefit of the municipality which does not prohibit the signing of the contract and furnishing the bond after the expiration of ten days, or prevent the board of supervisors from reasonably extending the time for so doing.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

The plaintiff in this case is a citizen, resident and taxpayer of this Territory and the owner of land situated in Manoa Improvement District No. 1, a residential section of the city and county of Honolulu. He purports to enter into this submission on behalf of all other citizens and taxpayers of said district, as well as on his own behalf, but no others have appeared. The defendant, as treasurer of the city and county of Honolulu, in furtherance of certain ordinances passed by the board of supervisors of the city and county and pursuant to a certain resolution of said board, proposes to prepare, issue, sell and deliver certain improvement bonds of the city and county, and this the plaintiff seeks to have enjoined. The plaintiff claims that the statute under which the municipal officials have proceeded is in conflict with the Fifth Amendment of the Constitution and section 55 of the Organic Act of this Territory; that the proceedings were not in conformity with the statute; and that the bonds, if issued, will be invalid. The improvement statute, comprising sections 1793 to 1813, of the Revised Laws, as amended in certain respects by Act 164 of the Session Laws of 1915, provides in substance, as follows: That whenever in the opinion of the board of supervisors of the city and county of Honolulu it is desirable to open, extend or widen, or to grade, pave, curb or otherwise improve any highway, such betterments or im-

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provements shall be made and done according to the provisions of the statute, and the cost thereof shall be assessed against the land benefited, either on a frontage basis or according to area, and, if the latter, the board of supervisors shall establish an improvement district, and the municipality may pay out of general revenue all or any part of the cost of acquiring any new land required, or of the improvement of a main or general thoroughfare (Sec. 1793); the board shall, by resolution, propose the making of any such improvement, specifying the character and extent thereof and the proportion, if any, of the cost proposed to be borne by the municipality, the materials proposed to be used, and whether the cost is to be provided by assessment per front foot against the land abutting upon such highway or per square foot according to area of land within an improvement district, the general boundaries of such district and sub-districts, if any, against which different proportions of the cost are intended to be charged, and directing the preparation of all necessary maps, plans, specifications, estimates and other details so as to show the total cost and the approximate share thereof that would be assessable against each parcel of land, and the part, if any, proposed to be borne by the municipality; and thereupon the board shall give notice by publication of all thereof to the owners, lessees and occupants of the lands proposed to be assessed or taken, and fixing a date and place when a public hearing will be had respecting the proposed improvements and a full opportunity given to all persons interested to present suggestions or objections to the proposed improvements or any part or detail thereof (Sec. 1794); if the owners of fifty-five per cent. of the total frontage or area to be assessed shall file a written protest against the making of the improvements or any part of the plan therefor the same shall not be made contrary to such protest (Sec. 1795); if sufficient protests have not been filed, and the board decides to

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proceed with the plan without material change, it shall, by resolution, create, define and establish the extent of the frontage or the improvement district to be assessed, define the kind, extent and details of the proposed improvements, declare the proportion of the cost which is to be borne by the municipality and the method of assessment determined on, and direct the preparation of a corrected map showing the exact location of the improvement and all details with final plans and specifications for the work, which shall be used as the basis for the calling for bids and awarding of contracts for doing the work (Sec. 1796); the owners of sixty per cent. of the frontage upon any highway or of the area of a proposed improvement district may by petition initiate such proceedings (Sec. 1797); all such improvements shall be constructed under contract let to the lowest responsible bidder after public advertisement for tenders; no bid shall be considered unless accompanied by a certified check, or its equivalent, for not less than ten per cent. of the amount bid, which shall be forfeited to the municipality unless the successful bidder shall sign the contract and furnish an approved bond for its faithful performance within ten days after the contract is awarded; and any other method of letting contracts shall be illegal and void (Sec. 1798); before the letting of any contract the board shall cause a corrected map to be prepared showing in detail the proportionate amount per front foot or per square foot, as the case may be, to be assessed against the property in the district, or sub-districts, if any, and a list of all known owners, lessees and occupants of the lands, and give notice by publication of the total amount of the cost of the improvement based upon the bid of the lowest responsible bidder, the maximum share per front foot or per square foot proposed to be charged to the district or sub-districts, and that the map may be seen and examined at the office of the city and county engineer, and fixing a date and place when a public

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hearing will be had and the supervisors will sit as a board of equalization to receive complaints or objections respecting the method of apportionment, or respecting the proposed several assessments (Sec. 1799); after such hearing the supervisors shall proceed to make such changes as they may deem just and equitable in, or shall confirm, the first proposed assessment, and, upon reaching a final decision, shall fix by ordinance the portions of such cost to be assessed against the lands in the district and the owners thereof respectively (Sec. 1800). Then follow provisions for the giving of notice to the land owners of the assessments and when the same shall be payable; as to liens upon the lands for unpaid assessments; and the sale at auction of land for default in payment. Section 1808 provides that at any such sale the treasurer of the city and county shall bid for any property so to be sold the amount due on account of the unpaid assessment, and if the bid is the highest offer shall pay for the same in cash out of the general funds of the city and county, and receive a conveyance of such property in the name of the city and county. And there are provisions authorizing the issuance of interest bearing improvement bonds by the city and county to defray the cost of any such improvement, such bonds not being a charge against or payable out of the general funds of the municipality, but only the special fund composed of the moneys collected on account of assessments made for the improvement for which they are issued, and the municipality shall not otherwise guarantee payment of any such bonds. Section 1812 provides that no action or proceeding at law or in equity to review any act done or to enjoin the performance of any act proposed to be taken under the statute shall be maintained unless begun within thirty days after performance of the act or the passage of the resolution or ordinance complained of.

The agreed facts show that on May 17, 1915, the board

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of supervisors commenced proceedings by adopting a resolution relating to proposed street improvements in Manoa Valley, Honolulu, and the creation of an improvement district therein to be known as Manoa Improvement District No. 1; that thereafter all necessary steps were taken, notices given, hearings had, resolutions and ordinances passed, assessments levied, and contract awarded in the manner required by the statute; the district defined comprised an area of 266.88 acres, divided into two sub-districts, and the plan included the grading, paving, curbing and draining of the streets of the district, the widening of certain of them, and the declaration of two of them to be main or general thoroughfares, twenty-five per cent. of the cost of paving which the municipality agreed to pay. The plaintiff made no objection at either of the hearings against the making of the proposed improvements, or the assessments to be levied, or the apportionment thereof. But on June 10, 1916, he paid the first installment of his assessment under protest claiming that the statute, ordinance and assessment are invalid under the Organic Act of the Territory; that the ordinance and assessment do not comply with the statute; and that the assessment does not comply with the ordinance. On June 27, 1916, the board awarded the contract to one Ritchie, the lowest responsible bidder, who agreed to do the work for the sum of \$187,633.31, and required of him that he execute the contract and an approved bond within ten days, but on July 7, upon the request of Ritchie's agent and of a representative of the surety company with whom negotiations were in progress for a contractor's bond, the board extended the time for executing the contract and bond until July 26, upon which date the instruments were executed. All the property owners within the improvement district have paid at least the first installment of the assessment, and there remains to be collected future installments aggregating the sum of \$146,431.33 bearing interest at the

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rate of six per cent. per annum, and it is proposed to issue bonds in the sum of \$146,000. bearing interest at the rate of five and one-half per cent. to cover the amount which will become due upon the contract pending the payment of the balance of the assessment.

On behalf of the plaintiff it is contended that the statute violates the Fifth Amendment of the Constitution by authorizing the taking of private property for public use without just compensation and without due process of law in that it fails to provide that the assessments on the different parcels of land affected must be in proportion to, and shall not exceed, the special benefits received from the improvements for making which the assessments are levied. True, as argued, the theory upon which taxation by special assessment for public improvements is sustained is that special benefits are conferred upon certain property and that that property shall contribute to the expense of the improvement in substantial proportion to the amount of benefit accruing to it from the improvement. 2 Page and Jones, *Taxation by Assessment*, Secs. 651, 665; 5 McQuillan, *Mun. Corp.* Sec. 2018. Special assessment statutes have given rise to a great mass of litigation and divergent views thereon have been expressed by different courts. It would be useless to attempt to review or reconcile the cases. Counsel for the plaintiff contend that their point must be sustained if it appears, as they claim it does appear, that the statute makes no provision that assessments shall *not* be in substantial excess of special benefits. Among the cases cited are *Norwood v. Baker*, 172 U. S. 269, and *White v. Gove*, 183 Mass. 333. In *Norwood v. Baker*, it appears that a strip of land was condemned and taken under the right of eminent domain for the purpose of opening a street through to connect with an existing street on each side of the strip in question. Pursuant to a State statute the whole cost of the operation, including the value of the strip and the ex-

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pense of the condemnation proceeding, was charged against the remainder of the land which abutted the strip taken on each side. The court held that to be contrary to the underlying principle of taxation for public improvements by special assessment, and constituted a taking of private property for public use without compensation and, therefore, without due process of law, in violation of the Fourteenth Amendment. That case as it has been limited and explained in a number of cases reported in volume 181 of the reports of the United States supreme court is not an authority for the point to which it is cited here. See *Wagner v. Baltimore*, 239 U. S. 207, 219. In *White v. Gove*, quoting *Dexter v. Boston*, 176 Mass. 247, it was said, "In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to cases which may be expected to arise." But the court also said, "The question of difficulty in dealing with cases of this kind is, How far may the court interfere with the legislative determination of a method for making special assessments? Of course, if a statute shows on its face that it entirely disregards the relation of the benefits to the taxes to be assessed upon the respective estates, it is plainly unconstitutional. In many cases, however, it is impossible to estimate the amount of benefit with absolute accuracy, and methods of determination must be adopted which are practicable, and which at the same time will give a reasonable approximation to accuracy. The selection of methods is primarily a matter for the legislature, and much latitude must be allowed it in the exercise of its judgment and discretion in regard to a subject of this kind. It is only when its decision is plainly one that will be likely to result in taxation that is either disproportional or unreasonable that the court can interfere. So in different cases a great variety of methods

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have been sustained by the court as within the legislative authority." 183 Mass. 335, 336. In *Sayles v. Pub. Works of Pittsfield*, 222 Mass. 93, where the validity of a sidewalk law which provided for the assessment of one-half the cost upon all lands especially benefited whether the same abutted upon the sidewalk or not, an assessment being levied according to frontage, was sustained, the court said, "The petitioners can prevail only on the ground that the statute on its face appears to be in conflict with the fundamental law." In *Embree v. Kansas City etc. Road District*, 240 U. S. 242, 250, the court said, "A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power." And in 4 Dillon, Mun. Corp. (5th ed.) Sec. 1443 (4) it is said that "the decided tendency of the later decisions * * * is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not a legitimate exercise of legislative authority or of the taxing power." In *Norwood v. Baker* the statute was held to be invalid because it constituted an arbitrary exaction in that it compelled the land owner to pay for his land which was taken for public use and also the expense attendant upon its condemnation. See also *Myles Salt Co. v. Iberia Drainage Dist.*, 239 U. S. 478. The statute of this Territory certainly is not open to that objection. It is fair on its face, and by no means necessitates the making of unfair or unequal assessments. On the contrary it discloses an intent on the part of the legislature to provide a plan whereby public road improvements may be made at the cost of lands to be specially benefited by the improvement; and *prima facie* at least, the cost of grading, paving, drain-

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ing and curbing a highway, other than a main artery of traffic perhaps, will not exceed the special benefits conferred upon the lands abutting on or adjacent to the street or streets to be improved. We believe that the statute, taken as a whole, is well within the requirements laid down by the authorities as being applicable in this class of cases and to this kind of statute. Gray, Limitations of Taxing Power, Secs. 1964, 1966, 1969. In a general statute such as this the requirement that assessments shall not exceed the benefits will, if necessary, be read into it. *Cheney v. Beverly*, 188 Mass. 81, 85; *Sayles v. Pub. Works of Pittsfield*, *supra*. And it is well settled that "The legislature, in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby." *Bauman v. Ross*, 167 U. S. 548, 589. To the same effect are *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 342; *Webster v. Fargo*, 181 U. S. 394; *Seattle v. Kelleher*, 195 U. S. 351, 358; *Houck v. Little River Dist.*, 239 U. S. 254, 265. An unobjectionable statute may be enforced in an arbitrary and illegal manner, and so put a particular assessment made under it under the ban of a constitutional provision. *Martin v. District of Columbia*, 205 U. S. 135; *Driscoll v. Northbridge*, 210 Mass. 151. But it is not claimed by the plaintiff in this case that the assessment was not in fact fairly apportioned among the lands within the district, nor that the assessment upon his land exceeded the special benefit accruing to it by reason of the improvement. We are of the opinion that the statute does not contravene either provision of the Fifth Amendment.

It is contended that the statute is in conflict with section 55 of the Organic Act of this Territory in that it provides for the incurring of indebtedness and issuance of bonds for

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public improvements by a municipal subdivision of the Territory without the approval of the President of the United States contrary to the inhibitions in that regard therein contained. The argument is that the bonds authorized to be issued by the statute are bonds of the city and county of Honolulu; that on being issued they would constitute indebtedness of the municipality; and that such bonds may not be issued, nor such indebtedness incurred, in view of section 55 of the Organic Act, without the approval of the President, and it is not intended to obtain such approval as to the indebtedness and bonds in question, nor does the statute require it. Bonds issued under the statute would be nominally the bonds of the municipality, but it does not follow that they must, in order to be valid, be approved by the President. The approval required by the Organic Act is to indebtedness incurred or loans made by the municipality, and to the issuance of "any bond or other instrument of any *such* indebtedness." If, therefore, the indebtedness proposed would not be that of the municipality the bonds to be issued as evidence of that indebtedness would not require the approval of the President though, in form, they would be the bonds of the municipality. The courts have repeatedly held that the issuance of bonds or certificates payable only out of a specific fund raised by a special tax for public improvements does not constitute municipal indebtedness within the meaning of constitutional limitations upon such indebtedness. The reason for this is that the municipality merely acts as the trustee of the fund and the agent for its collection under the statute and disbursement under the contract. *Mankato v. Barber Asphalt Paving Co.*, 142 Fed. 329, 346; *Quill v. Indianapolis*, 124 Ind. 292; *Catlettsburg v. Self*, 115 Ky. 669; *Kelly v. Minneapolis*, 63 Minn. 125; *Kansas City v. Ward*, 134 Mo. 172, 185; *Little v. Portland*, 26 Ore. 235, 245; *Baker v. Seattle*, 2 Wash. 576. But, it is argued, our

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statute goes further, and requires that, in the event of the non-payment of assessments and the sale of lands because of the non-payment, the municipality shall bid the amount due upon the assessments and may thereby incur liability as purchaser necessitating expenditures from the fund of its general revenues. Such liability is no different in principle from that which might arise under a statute not containing the provision referred to in the event of a deficiency caused by the failure of the municipal corporation to collect the assessments in full. And it is held that the possibility of such liability does not alter the rule. See *Beaumont v. Masterson*, 142 S. W. (Tex.) 984, 987; *Baker v. Seattle*, *supra*, 582. Such a contingent future liability does not constitute indebtedness within the meaning of the constitutional provision. *Bismark Water Supply Co. v. Bismark*, 23 N. D. 352, 362; *Quill v. Indianapolis*, *supra*; *Little v. Portland*, *supra*. See also *People v. Arguello*, 37 Cal. 524. In *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, it was held that the making of a public improvement to be paid for out of a special fund to be raised principally by special assessment but partly by general taxation did not give rise to an indebtedness, and that no question as to the incurring of an indebtedness would be presented unless in the event of the city's failure to raise its share of the fund by a general tax it should attempt to borrow the amount. And in *Corey v. Ft. Dodge*, 133 Ia. 666, it was held that the letting of a contract for a public improvement, the cost of which was to be paid by special assessment against abutting property, did not constitute an indebtedness though it was provided that any deficiency would be supplied from another fund raised by a general tax. In the case at bar it is clear that the municipality is not attempting to borrow money, and it will not be driven to the necessity of making a loan unless in the event of the non-payment of assessments and the purchase of land within the improvement district it shall

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be without funds to pay therefor. What, if that situation should arise, would be the liability of the municipality, and what rights, if any, a taxpayer could assert need not be inquired into at this time. We are of the opinion that in proceeding with the proposed improvements under the statute the city and county of Honolulu will not be incurring any indebtedness or making a loan or a bond issue within the purview of the Organic Act. What has been said we think disposes of the contention that the improvement plan runs counter to the further clause in section 55 of the Organic Act which provides that no "debt" shall be authorized or contracted by any municipal corporation except to pay interest upon existing indebtedness, to suppress insurrection, or to provide for the common defense. Neither the statute, nor the contract made under it, nor the proposed bond issue authorizes or contracts a debt of the municipality within the meaning of the act. Reference was made in the plaintiff's brief to the case of *Robinson v. Baldwin*, 19 Haw. 9, decided in 1908, in which it was held that as the municipal sub-divisions of this Territory have not been given the power of taxation they have no authority to issue bonds. The ruling made in that case has been rendered obsolete through the amendment by Congress on May 27, 1910, of section 55 of the Organic Act.

It is contended that the proceedings did not comply with the statute in that they included a combined assessment according to area and frontage whereas the statute (Sec. 1793) provides for the use of those two methods in the alternative. We think there is no merit in this point. The agreed facts show that the plan intended to be carried through by the board of supervisors included a combination of improvements. The board was authorized to divide the district into sub-districts and to treat them differently according to their condition and situation, and the assessment for grading and paving according to area, while that for

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curbing was according to frontage, was authorized by the act, and, apparently, equitable. Moreover, the plaintiff made no objection to the method pursued at the hearing accorded for the consideration of objections, and the time has passed for making such. See *Hildred v. Longmont*, 47 Colo. 79, 97.

The plaintiff contends that in order that bonds issued under the statute may be valid every step required by the statute must have been taken strictly as directed, whereas the agreed facts in this case show that the contract and bond were not executed by the contractor within ten days from the date of the awarding of the contract, as required by section 1798. In *Perine v. Forbush*, 97 Cal. 305, the statute provided that "if said original bidder neglects, fails or refuses for fifteen days after the first posting of notice of the award to enter into the contract, then the city council shall again advertise for proposals, as in the first instance, and award the contract for said work to the then lowest regular responsible bidder." The court said, "It is true that statutes which fix the time within which official acts are to be performed are often held to be merely directory as to the time so fixed, but such a statute is never so construed when its language indicates the contrary intention; as, for instance, when the statute attaches a consequence to the failure to perform the act within the time limited," and held that the provision was mandatory. But the provision here is quite different; it is that "No bid shall be considered unless accompanied by a certified check, or equivalent, payable in and in favor of the city and county, for not less than ten per cent. of the amount bid; which check, or equivalent, shall be forfeited to the city and county unless the successful bidder shall sign the contract and furnish an approved bond within ten days after the contract is awarded." The language of the California statute was equivalent to an express declaration that a contract should not be executed after the expiration of fifteen days from the date of the award. Our statute neither

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expressly nor impliedly goes to that extent. The provision is not that the contract shall not be signed after the lapse of ten days, or that a readvertisement be made, but merely that the check or equivalent be forfeited. The abandonment of the contract by the successful bidder would merely have required another advertisement for tenders, resulting, perhaps, in an increase in the amount of the assessment. The taxpayers were not injured by the signing of the contract after ten days had passed. We think that the provision is one for the benefit of the city and county, and that the board of supervisors acted within its rights in extending, in good faith, the time for the execution of the contract and bond. As all the requirements of the statute and ordinance essential to the validity of the proposed bonds had been complied with, we think a recital to that effect on the face of the bonds would be in no way improper.

A judgment denying the injunction prayed for may be entered.

R. B. Anderson (*Frear, Prosser, Anderson & Marx* on the brief) for plaintiff.

A. M. Cristy, First Deputy City and County Attorney (*A. M. Brown*, City and County Attorney, *W. T. Carden*, Second Deputy City and County Attorney, and *Smith, Warren & Sutton* with him on the brief), for respondent.

Syllabus.

A. M. STEWART AND JAMES C. STEWART, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JAMES STEWART & COMPANY *v.* Z. S. SPALDING.

No. 904.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED AUGUST 28, 29, 1916.

DECIDED NOVEMBER 17, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CONTRACTS—*arbitration—condition precedent to action.*

Where, by the terms of a contract, an obligation to submit a question to arbitration depends upon a condition precedent, as that a disagreement shall have arisen, the party who sets up the agreement as a condition precedent to the maintenance of an action upon the contract must show that a disagreement did occur whereby a question to arbitrate was raised.

SAME—*building contract—departure from terms.*

Where a building contract provides that no alterations shall be made in the work except upon the written order of the architect, and no extra compensation shall be due the contractor for work or material except in accordance with a written agreement or by order of the architect with the approval of the owner, and it is shown that the requirements were not lived up to, but that verbal orders were given, received and acted upon, neither party may set up the provision of the contract to defeat the just claims of the other.

SAME—*same—parol evidence not admissible to vary.*

In an action on a contract for the erection of a building for an agreed price in accordance with certain plans and specifications, the contract containing a provision as to further compensation for extra work, parol evidence that at the time the contract was entered into a different understanding was had as to the amount of work to be done for the agreed price is not admissible.

Syllabus.

SAME—same—time—waiver—action on express contract.

Though time be of the essence of a building contract and performance within the time specified is not shown, an action on the express contract may nevertheless be maintained if the requirement as to time was waived by the owner, and the plaintiff may recover by showing that he completed the work in a reasonable time after the date named in the contract.

WAIVER—question of law or fact.

The question of waiver is usually a mixed one of law and fact for the jury, but where the facts are undisputed and are susceptible of but one reasonable inference it becomes one of law for the court.

ACCOUNT STATED—admission—promise to pay.

Liability upon an account stated implies an admission of indebtedness in a definite sum and a promise, express or implied, to pay the same. The admission and promise will be implied from the receipt and retention of an account without making objection thereto within a reasonable time, but if the conduct of the party to whom the account was rendered was such as to exclude the idea of acquiescence an account stated is not shown.

ARCHITECTS—effect of certificate.

The certificate of an architect that a certain sum is due the contractor, which contains the statement that "it is not to be interpreted as an acceptance of any work or material which is defective, or which is not in accordance with the contract, and in making payment under it the owner reserves the right to hold the contractor strictly responsible for defective work or material, or for any violation of the contract," is no more than *prima facie* evidence that certain work has been done and the contractor is entitled to the compensation specified, and does not constitute an admission binding on the owner, in the absence of proof of fraud or collusion, that the work has been fully completed in accordance with the contract.

SAME—authority to change terms of contract.

In an action upon a building contract where it appeared that an owner accepted an offer of a contractor for the erection of a building upon certain terms and a contract embracing those terms was prepared, and thereafter the architect, in the absence of the owner, agreed with the contractor that some of the terms should be changed, an instruction to the jury to the effect that the action

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of the architect was not binding on the owner in the absence of proof of ratification by him unless the architect had been specially authorized to change the terms of the contract held erroneous, there being no evidence that the architect had been given such authority.

OPINION OF THE COURT BY ROBERTSON, C. J.

The plaintiff in error was the defendant in an action of assumpsit tried in the circuit court with a jury wherein judgment was entered against him in the sum of \$57,038.76. The plaintiffs' complaint included four counts. The first count was upon a contract in writing bearing date the 29th day of July, 1909, and alleged to have been modified by certain letters dated August 3 and 10, 1909, for the construction of a building at Portland, Oregon, a balance of \$54,506 being claimed to be due and unpaid under said contract. The second count was in *quantum meruit* for the reasonable value of the material furnished, and the work and labor performed in the erection and completion of the building. The third count was upon an account stated wherein it was alleged that in the month of February, 1911, the parties found to be due, and the defendant promised to pay, the sum of \$54,506. The fourth count was in *quantum meruit* for the value of additional work, including the furnishing of material and labor, upon said building not covered by the contract. The defendant, in his answer, denied that there remained an unpaid balance due the plaintiffs under the contract or otherwise, and claimed that the sum of \$26,500 had been improperly charged against him, and that he had been damaged by reason of delay in the completion of the building and by defective construction, in the sum of \$25,811.25. The jury returned a verdict for the plaintiffs in the sum of \$38,847.63, with interest from February 3, 1911.

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At the outset there is a dispute as to what the contract between the parties was. The evidence showed that the plaintiffs by a letter dated at New York on July 29, 1909, addressed to the defendant at that city, made alternative offers based upon plans and specifications prepared by one Cass Gilbert, an architect, the second of which was as follows:

"2. We will erect this building on a percentage basis, you paying only the exact cost of the building with the changes made in the plans and specifications, as estimated, Four Hundred Eighty-two Thousand, Three Hundred Fourteen Dollars (\$482,314.00); you paying us for our services Eight Per Cent (8%) of the actual cost of the building, or, if you prefer, we will make a fixed commission of Thirty-eight Thousand Dollars (\$38,000.00) on the building erected in accordance with the changes now outlined, subject to any increase for any additional work done not now determined upon; our employment under this proposition being arranged for practically in accordance with the contract which I showed you some months ago, made between us and the owners of the First National Bank Building, Denver, which we are now erecting, which contract provides:

"That we shall furnish at our expense such machinery, tools and equipment as are necessary for the prompt erection of the building;

"That we will make every effort to adopt every practical means to reduce the cost of the building as far as possible;

"That we will keep separate accounts, files of letters, etc., for this work;

"That we will furnish monthly statements of all materials entering into the building, payrolls, and amounts due to sub-contractors;

"That we will maintain an office in Portland;

"That we will attend to the question of insurance, employer's liability, etc."

The defendant accepted the offer on the fixed commission basis with the modification, mutually agreed upon, to the effect that should the contractors effect a saving on the

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total cost without modifying the quality or extent of work or materials they should receive an additional 10% commission on the amount of such saving. The defendant left New York for Europe on August 1. On August 3 A. M. Stewart addressed a letter to Cass Gilbert saying, among other things:

"In order that there may be no question with Col. Spalding as to what items enter into the cost of the building in ascertaining finally what is the actual cost, and there may not be charged against our commission certain payment which really enter into the cost of the work, we desire to have added to the specifications, or to the contract a clause clearly stating this understanding, and I would suggest the following, viz:

" 'In calculating the cost of the building under this contract there shall be included therein the amount of all sub-contracts, of all material entering into this construction, and the wages of all persons employed upon the building, also the cost of all permits, surveys, temporary office with telephone and supplies, temporary heat, light, enclosures, floors, bridges to the sidewalks, etc., temporary water closets, and other plumbing, freights on all materials, equipment and tools, liability insurance, and repairs to streets or to the adjoining property.' "

Replying thereto on August 10 Gilbert wrote:

"As to the second and third paragraphs of your letter, I think there can be no question 'as to what items enter into the cost of the building in ascertaining finally what is the actual cost.' The general conditions of the specifications are clear on this subject and I find your statement of the case to be correct on the subject as follows: 'In calculating the cost of the building under this contract there shall be included therein the amount of all sub-contracts, of all material entering into its construction and the wages of all persons employed upon the building, also the cost of all permits, surveys, temporary offices with telephone and supplies, temporary heat, light, enclosures, floors, bridges to sidewalk, etc., temporary water closets, and other plumbing, freights on all materials, equipment and tools, also

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liability insurance and repairs to streets or adjoining property.' ”

A contract was drawn up by the architect and the plaintiffs signed the same on August 27, and the defendant signed it on his return from Europe on September 11. A clause in the specifications which were made part of the contract provided that “The contractor is to provide derricks, hoists, machinery, scaffolding, tools and appliances of every description required for the proper execution of this work.” It was also provided in the specifications that “The general permit for the erection of the building will be obtained by the architect at contractor’s expense. The contractor shall obtain and pay for all other permits which may be required by the city laws and regulations.” Thus appeared a flat contradiction between the terms of the offer made by the plaintiffs in their letter of July 29 and the contract executed by the parties, on one hand, and the terms of the letters of August 3 and 10, on the other. The cost of tools and equipment, permits, liability insurance, and the maintenance of a temporary office in Portland constituted a part of the plaintiffs’ claim and was admitted in evidence over the objections of the defendant. The court instructed the jury that “The burden is also upon the plaintiffs of proving by a preponderance of the evidence that the letters of August 3, 1909, and August 10, 1909, between the architect and the plaintiffs were ratified by the defendant. If you find that they were so ratified, then the written contract was to that extent modified. But if you find that they were not so ratified, then I instruct you that the architect, unless specially authorized so to do, could not vary the terms of the written contract between the plaintiffs and defendant.” Counsel for the defendant conceded that if the letters in question were brought to the defendant’s attention and had been ratified by him they should be regarded as having modified the contract. Their

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contention is that there was no evidence which would have authorized the jury to find a ratification by the defendant. The defendant testified that the letters had not been shown or read to him. Mr. Gilbert testified that on September 11 he showed the letters to the defendant, read them to him and told the defendant that he had proceeded on the basis of them and that the defendant approved the action. In reply to a question as to whether the defendant had expressed his approval, the witness said, "There was no expression of disapproval, and my memorandum shows that he did approve, but just what was the language I am not able to say." This was objected to and there was a motion to strike on the grounds that it was a mere conclusion and that it referred to a memorandum which was not produced. We think there was merit in the objection, but we think also that there was sufficient evidence which went in without objection irrespective of the last answer to carry the question of ratification to the jury. But the point made on behalf of the plaintiff in error that the instruction given was erroneous in that it left it to the jury to say whether the architect had been specially authorized to vary the terms of the written contract between the parties, we believe to be well taken. The new terms introduced by the two letters amounted to the making of a new contract, and we find no evidence in the record to show that the architect was authorized to make a contract on behalf of the defendant. In this connection is to be considered also the admission in evidence over the defendant's objection of a copy of a contract made between James Stewart & Co. and the Puget Sound Realty Associates Corporation, dated March 15, 1909, for the erection of a building in Denver, Colorado, being the contract referred to in plaintiffs' letter of July 29. The evidence seems to have been introduced upon the theory that it was relevant on the point whether the things included under the term "cost" in the

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letters of August 3 and 10 should be paid for by the owner or the contractor. The contract in question was irrelevant and ought not to have been admitted. It constituted no part of the contract between the parties to this action. The question whether the plaintiffs' proposition as stated in their letter of August 3 had been accepted and had become a part of the contract depended on whether defendant in fact knew of and acquiesced in the reply made thereto by the architect. Nothing contained in the contract with the Denver concern could throw any light on that question.

At the close of the case for the plaintiffs the defendant moved for a directed verdict on the grounds that no evidence had been adduced to show (1) that the parties had agreed on the amount to be paid or allowed on account of alterations or changes alleged to have been directed to be made in the construction of the buildings as provided by article III of the contract; or (2) that the plaintiffs have selected or asked the defendant to select arbitrators to fix the amount to be paid for such alterations or changes; or (3) facts excusing plaintiffs from the selection or attempt to select such arbitrators; and (4) that the performance of the work, or furnishing of the materials, for or on account of alterations or changes (except in a few specified instances) was in accordance with any written agreement or by written order of the architect with the approval of the owner as provided in the specifications. The contention was that as the aggregate charge made in the plaintiffs' account for changes made in the building during the course of construction exceeded the amount claimed by the plaintiffs in this action the plaintiffs could not recover because the extra charges had not been incurred in the manner provided in the contract and specifications. Article III of the contract provided that "No alterations shall be made in the work except upon written order of the architect; the amount to be paid by the owner or allowed by the con-

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tractors by virtue of such alterations to be stated in said order. Should the owner and contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration as provided for in Art. XII of this contract." The trial court construed the article to mean that the architect, as agent of the owner, was given authority to order alterations and also to set the price of such alterations, and that the acceptance of that price by the contractors would close the matter. We think that the owner as well as the contractors had the right to dissent from the prices fixed by the architect, but, though there was some criticism, there was no evidence of a definite dissent coupled with a request to arbitrate. The prices for alterations fixed by the architect having been accepted by the contractors and no disagreement or request for arbitration having been expressed by the defendant there was nothing to arbitrate, and no obstacle existed to the institution of the action. See *Schmulbach v. Caldwell*, 196 Fed. 16, 23; *Foster v. McKeown*, 192 Ill. 339, 349; *Burke v. Dittus*, 8 Cal. App. 175, 178; *Fravert v. Fesler*, 11 Colo. App. 387, 391. Where, in a case of this kind, the obligation to submit a question to arbitration itself depends upon a condition precedent, as that a dissent from the price fixed by the architect has occurred, the party who sets up the agreement as a condition precedent to the maintenance of an action upon the contract must show that a dissent was expressed and a question to arbitrate raised. We find nothing to the contrary in the cases cited in this connection by the plaintiff in error. In *Holmes v. Richet*, 56 Cal. 311, the architect was not authorized to put a value on the extra work. The contract provided that "should any dispute arise respecting the true value of the extra work or works omitted" the value should be fixed by arbitrators, and it appeared that "difficulties had arisen respecting the

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true value of the extra work," hence, the court held that "no right of action accrued to the contractor for the extra work done by him until the same was valued, or some good and sufficient excuse for a failure to value the same in accordance with the agreement was shown." A clause in the specifications provided that "no extra compensation shall be due the contractor for the performance of any work or furnishing of any material, except in accordance with written agreement or by written order of the architect with the approval of the owner." The approval of the owner was not required to be in writing and under the circumstances shown it was a fair question for the jury whether the owner did not approve some or all of the orders given by the architect. There was evidence that in several instances the owner himself had ordered changes to be made for which extra compensation might be claimed, and if the parties did not live up to the requirement of the specifications neither could set it up to defeat the just claims of the other. *Kilby Mfg. Co. v. Hinchman-Renton F. P. Co.*, 132 Fed. 957; *Smith v. Gugerty*, 4 Barb. 614, 623. The motion for a directed verdict was correctly overruled.

A difference of opinion arose between the parties as to whether the cost of the subdivision of certain floors of the building into offices was included in the contract price or could properly be made the subject of an extra charge. The contract provided for the construction and completion of the building "as shown on the drawings and described in the specifications" which "become hereby a part of this contract." Neither the contract itself nor the specifications mentioned the number of floors which the building was to contain or how they were to be subdivided, but the plans showed a basement, twelve floors and an attic. The dispute concerned the second, third, fourth, fifth, tenth, eleventh and twelfth floors, the plans of which showed what were spoken of as "loft" floors, that is, floors without par-

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titions save for lavatories and a general partition dividing the common corridor from the space which would be subdivided into rooms. The defendant testified to his understanding that the drawings for those floors showed no subdivisions of rooms for the sole reason that the arrangement of rooms was to be left in abeyance until the wishes of the prospective tenants could be ascertained, and that, when decided upon, the contractor would be notified, and the partitions put in accordingly, and that this work was included in the contract price. This understanding was based on a conversation which the defendant had with Stewart in the preliminary negotiations between them. The plaintiffs contended that the contract required them to do no more work than was called for by the plans and specifications, and that as the subdivision of the floors in question was not therein required the cost thereof, when the work was directed to be done, was properly made the subject of an extra charge. Evidence on the point was admitted and the defendant asked that it be left to the jury to decide as a question of fact, but the court ruled that as a matter of law the contract price did not include the cost of the subdivision of those floors, and instructed the jury accordingly. The argument advanced on behalf of the plaintiff in error is that the entire agreement between the parties was not reduced to writing; that parol evidence was admissible to show the portion of the contract which was not in writing; and that it was for the jury to decide whether there was in fact an agreement that the contract price would cover the subdivision of all the floors. Whether or not a written contract was intended by the parties to cover the whole agreement between them is to be decided from the character and form of the contract and the evidence of the surrounding circumstances under which it was made. There is a conflict of authority on the point as to whether the parties intended to express the whole of their agree-

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ment in the written instrument presents a question of law or of fact. See 17 Cyc. 748; 4 Wigmore on Evidence, Sec. 2430. But we believe there is no such conflict where it appears that the terms which it is claimed were verbally agreed upon are inconsistent with the provisions of the writing. In such cases the rule which excludes parol evidence in contravention of the terms of a valid written agreement applies. In an action on a contract for doing certain work according to certain plans and specifications and containing a provision as to compensation for extra work evidence that at the time the contract was entered into a different understanding was had on that point is not admissible, or if admitted will not affect the construction of the instrument. *Merritt v. Peninsular Const. Co.*, 91 Md. 453; *Wood v. Fort Wayne*, 119 U. S. 312; *Kilby Mfg. Co. v. Hinchman-Renton F. P. Co.*, *supra*, at page 963. An independent collateral agreement may be proved by parol though it rests upon the same consideration as the written contract if it is not inconsistent with the terms of the contract. *Cummings v. Pioneer B. & L. Assn.*, 18 Haw. 349; *Durkin v. Cobleigh*, 156 Mass. 108. But that is not the situation here. In the case at bar the contract obliged the contractor to do extra work if directed and provided that he should receive extra compensation therefor. Evidence that the contractor had agreed to erect certain partitions not called for by the plans without additional remuneration tended to vary the terms of the written contract. Whether the matter sought to be proved was inconsistent with the instrument signed by the parties was a question of law, and the court made no error in charging the jury as it did.

The case was submitted to the jury upon all four counts of the complaint. The jury were instructed that should they find for the plaintiffs upon either of the *quantum meruit* counts no interest should be allowed, and

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as the verdict included interest it is presumed that it must have been found under either the first count, upon the contract, or the third count, upon the account stated. The plaintiff in error contends that as a verdict under the first count it was against the law and the evidence and that there was error in the instructions relating to recovery on the contract, also that the case ought not to have been submitted to the jury on the third count as there was no evidence tending to prove an account stated.

The agreed compensation payable to the contractors for the erection of the building under the contract was \$482,314, for work and materials, and \$38,000, contractors' commission, with the further provision for an additional commission upon a saving in the cost of work and materials as above stated. The total cost of the completed building, according to the statement rendered by the plaintiffs, including all charges for alterations, additional work and commissions, was \$562,267.42, upon which payments had been made amounting to \$505,665.03. The contract provided that the banking room (first floor) should be completed on or before March 1, 1910, and the remainder of the building on or before July 1, 1910. From evidence adduced the jury could have found that the building had been substantially completed in the manner required by the contract and the orders for changes and additions, and that the delay in its completion resulted entirely from the alterations and additional work ordered from time to time by the defendant and the architect. On the other hand the evidence would have warranted a finding that the making of the changes and additions did not account for all of the delay. There was evidence to the effect that the first floor was completed within the time specified, and that the remainder of the work was not finally finished until January 5, 1911. The last or "final" certificate issued by the architect was dated February 6, 1911. It was pro-

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vided in the specifications that "The contractor will be credited with one day's extension of time for the completion of the work for each day's delay caused him by the orders or acts of the owner or of the architect in requiring suspension or delay of operations on account of modifications. * * * In order to receive credit for delays the contractor must make and file with the architect a written claim for allowance of time on account of delays caused within a reasonable time of the occurrence of same; but the time shall not be extended unless such claim is found by the architect to be reasonable, and that contractor is fairly entitled to such allowance under this agreement." There were 67 orders given for changes and additions, the first, and only one for which time (three weeks) was specifically allowed, occurring before the contract was actually signed, and the last one in September, 1910. On July 1, 1910, Spalding complained to Gilbert in regard to the uncompleted condition of the building, and there was some correspondence between Gilbert and Stewart & Co. on the subject in which the former called the attention of the latter to the fact that they had not completed the building on time, and notified them that Spalding did not waive the condition. Stewart & Co. attributed the delay to the changes which had been ordered. On January 31, 1911, they wrote Gilbert, enclosing a statement of the change orders, stating that they had resulted in the contractors being kept on the job until January 5, and asking that the architect so certify, though expressing their opinion that the contract did not require that extensions of time for making changes should have been obtained by the contractors. Gilbert had informed Stewart & Co. that it was not for him to adjust claims growing out of delays and it does not appear that he made any certificate that the delay in completion was attributable to the changes ordered though he gave evidence that such, in his opinion, was the

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fact. The certificate issued did not amount to a consent to or approval of the delay. *Stephens v. Essex County Park Commission*, 143 Fed. 844, 849. The instruction requested by the defendant to the effect that the plaintiffs not having obtained extensions of time for completing the building as provided for in the contract no recovery could be had under the first count upon the express contract since time was of the essence, was properly refused. Though time be of the essence of a contract and performance within the time specified is not shown, an action on the contract may nevertheless be maintained if the requirement as to time has been waived. *Phillips etc. Const. Co. v. Seymour*, 91 U. S. 646, 651; *Maryland Steel Co. v. United States*, 235 U. S. 451, 457. No direction or instruction was given on the subject of waiver. The defendants in error contend that Spalding waived the time for performance by making payments on account after the contract time for performance had passed, by permitting the contractors to continue the work, and by occupying portions of the building as they were completed. And, it might have been added, by giving further orders for alterations. The contract contained a clause providing that upon the architect's certifying that the contractors had refused or neglected to prosecute the work with diligence the owner should be at liberty to terminate their employment and complete the work at their expense. Perhaps no one of those facts, standing alone, could be regarded as conclusive evidence of waiver or even sufficient to carry the question to the jury for decision, but we believe that the combination of circumstances, shown by undisputed evidence, was consistent only with the view that the contract was regarded as still subsisting, and warrants only one reasonable inference, which is that Spalding waived the contract requirement. The position taken by him that he was entitled to damages because of the delay was not inconsistent with an intention to waive the require-

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ment as to time since he could still insist upon a claim for damages for any delay caused by the plaintiffs. *Crocker-Wheeler Co. v. Varick Realty Co.*, 88 N. Y. S. 412. See also cases last above cited. The question of waiver is usually a mixed one of law and fact for the jury, but where the facts are undisputed and are susceptible of but one reasonable inference it becomes one of law for the court. 40 Cyc. 271; *Hollings v. Bankers' Union*, 41 S. E. (S. C.) 90; *Zwietusch v. Luehring*, 156 Wis. 96, 114; *Reed v. Bankers' Union*, 121 Mo. App. 419, 426; *Keller v. Robinson*, 153 Ill. 458, 468; *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465, 470. See also *Dunn v. Steubing*, 120 N. Y. 232; *Bigler v. Ferry Co.*, 5 N. Y. S. 347; *Paddock v. Stout*, 121 Ill. 571. The court should have ruled that the defendant had waived the time stipulated in the contract for the completion of the building. The evidence was such as to require the submission of the case to the jury upon the count on the express contract. But the instruction given to the jury to the effect that they should find whether written claims for extensions of time were filed within a reasonable time of the occurrence of delay and were found by the architect to be reasonable, and that the decision of the architect would be binding if the jury should find that it was made within the powers given him by the contract, and that if they should find that no such extension had been obtained the plaintiffs could not recover upon the first count, was erroneous. There was no evidence, except as to one extension of three weeks, over which there was no controversy, that any request for extension of time was made in writing within a reasonable time of the occurrence of delay. And it was not for the jury to say whether a decision of the architect was within his powers under the contract. Furthermore, there was no evidence, except as to the one instance mentioned, that the architect had made any decisions upon applications for extensions. The question for the jury to

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decide upon the evidence was whether or not the plaintiffs had completed the building in a reasonable time after the date specified in the contract. The waiver by the owner of the time specified in the contract did not operate to give the contractors an unlimited time in which to finish the work. In order to recover on the express contract the plaintiffs were obliged to show that they had completed the work in a reasonable time. See *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 30; *O'Loughlin v. Poli*, 82 Conn. 427, 436. If the work was finished in a reasonable time, or, in other words, if the changes ordered to be made fully accounted for the delay, the plaintiffs could recover on the first count of their complaint and the defendant would not be entitled to recoup any damages for delay, whereas, if the changes ordered did not cause the whole delay, and the failure to complete the building in a reasonable time after the date named in the contract was the fault of the contractors, recovery could not be had on the first count, but only in *quantum meruit* for the reasonable value of the work less such damages as the defendant might prove.

The plaintiff in error contends that the court erred in authorizing the jury to find for the plaintiffs upon the third count in the complaint. The court charged the jury, in substance, that if they should find from the evidence that upon the completion of the building the defendant received a final account, making objection to certain items therein and making no objection within a reasonable time to other items in the account then the law presumes that he admitted the items not objected to to be correct, and the burden would be upon the defendant to rebut the presumption, and that in determining whether or not the defendant did object to items within a reasonable time the jury could take into consideration the magnitude and complexity of the account and all other facts relative thereto. The record

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shows that the final account of the plaintiffs against the defendant which was forwarded to him through the architect showed a balance due them of \$56,602.39. The amount claimed in this case under plaintiffs' amended complaint, and for which the jury were authorized, under the instruction, to find for the plaintiffs, was \$54,506. There was no evidence that the defendant objected to any specific items in the account. Although the account contained a great mass of figures the several statements, other than those showing the charges made for extra work on change orders, were of a general character. There was evidence showing that the account was sent by Gilbert to the defendant at San Francisco on January 10, 1911, where it reached him, it may be presumed, in the ordinary course of the mail. On January 23 the defendant wrote Gilbert acknowledging the receipt of "another large lot of statements of Stewart & Co." which he was "unable to fathom;" making some general complaints as to the delay in completing the building, the conduct of the work, and the manner in which the account had been made up; criticizing the architect as well as the contractors; asking for further information; finding fault on the subject of washbowls, saying, "I understand there are a large number of bowls that were never set up as well as a number that were condemned;" and saying further that "If Stewart absolutely refuses to consider the question of delay and considers he is entitled to pay according to the statements he has rendered, without further explanation or approval on your part, I shall have to consult my lawyer about further action." On receipt of that letter Gilbert again called the attention of Stewart & Co. to the matter of delay. In a letter addressed to Gilbert by Stewart & Co. on January 31 they stated their position that the delay was caused by the changes which had been ordered, and concluded by saying, "If any certificate is required from you, which we doubt, we think you

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should certify that the extra orders in this case caused us a delay—if that is the proper word to use—until January 5, 1911.” On February 6, 1911, Gilbert wrote Spalding a letter in reply to his of January 23 explaining certain matters and giving further information. A copy of Stewart & Co.’s letter of January 31 was enclosed, and this comment made, “Over \$70,000 of extras (or in excess of one-eighth of the total volume of the work) were added to the original contract, much of this was added very late in the season and judging from my experience I believe it improbable that you could force a penalty for delay under the circumstances. I would therefore unhesitatingly recommend against it because I believe it would not succeed and would only lead to fruitless expense on your part. Of course what might be accomplished by negotiation in this direction is a different matter; it is possible that they might make some adjustment in settling with you but I am not encouraged to think even this possible now.” The letter referred to certain things about the building which required the attention of the contractors and said, “I understand finally from your letter that you want me to prepare a final certificate upon which you can take action. I therefore enclose herewith such certificate deducting therefrom the sum of \$1500 to cover the cost of the minor items which are above referred to as needing repairs.” In the meantime Spalding went to Portland and had the building examined, and on February 23 wrote to Gilbert enclosing a report of experts on alleged defects in the building and saying, “I find their (Stewart & Co.’s) lawyers have entered a lien on the building, but have not heard what they intend to do further; and I am not aware of their giving any attention to the matters of delays and losses incurred by the conditions I have reported.” That letter having been referred to Stewart & Co., they replied thereto in a letter to Gilbert dated April 18, wherein, after referring specifically

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to the various claims of defects, they said, "You will note from the above that all the matters referred to in report sent by Col. Spalding have received attention, either have been done or ordered to be done, with the exception of the heating system, which we are investigating; the cracks in the mosaic floor; the moisture in the attic walls which we do not deem it our duty to remedy; and the 'dish' in the oil tank which we believe has been installed in accordance with instructions * * * and in dealing with these matters you will, of course, understand that we do not in any way waive or prejudice our claim that Col. Spalding is in default on his final payment for the building, which is the subject matter of our claim against him in Oregon." This evidence consisting of undisputed correspondence clearly negatives the idea that the defendant accepted the plaintiffs' account as showing the correct balance due them under the contract. Liability upon an account stated implies an admission of indebtedness in a definite sum and a promise, express or implied, to pay the same. The action is upon the new promise and not on the original indebtedness. See *Scott v. Hawaiian Tobacco Plantation*, 21 Haw. 493. The admission and promise will be implied from the receipt and retention of an account without objection made within a reasonable time, but a specific objection to certain items or a denial of all liability is not necessary to be shown to defeat a claim for where, as in the present case, the conduct of the party excludes the idea of acquiescence, an account stated is not shown. 1 C. J. 694; *Ault v. Interstate Sav. Assn.*, 15 Wash. 627; *Quincey v. White*, 63 N. Y. 370, 377. We hold that there was no evidence from which the jury could have found that the defendant admitted an indebtedness in the sum of \$56,602.39 or \$54,506, or any other definite amount, and that error was committed in submitting the case to the jury on the count alleging an account stated.

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Error has been assigned with reference to an instruction which was given to the jury as to the effect of the architect's so-called final certificate. It is not contended that the plaintiffs may not maintain this action for the lack of a final certificate, though it is argued that none such was issued. The objection goes to the construction placed by the court upon the certificate which was issued and leaving it to the jury to say whether it was issued as a final certificate under the contract. It was provided in the contract that "The final payment shall be made upon satisfactory completion of the work included in this contract, and all payments shall be due when certificates for the same are issued," and that "It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or payment, shall be conclusive evidence of the performance of this contract, either wholly or in part." It may be assumed for present purposes that if the architect had issued a certificate to the effect that the contract had been fully performed by the completion of the building it would have constituted conclusive evidence of the fact. But it has been pointed out that the last certificate issued by the architect, which was spoken of at the trial as the "final" certificate, was in the same form as the intermediate certificates and contained on its face the statement that "This certificate, whether issued as final or otherwise is an opinion only, and is in no sense a guarantee on the part of the architect. It is not to be interpreted as an acceptance of any work or material which is defective, or which is not in accordance with the contract, and in making payment under it the owner reserves the right to hold the contractor strictly responsible for defective work or material, or for any violation of the contract." The court instructed the jury that "The contract provides that 'the final payment shall be made upon satisfactory completion

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of the work included in this contract, and all payments shall be due when certificates for the same are issued.' The final certificate of the architect, if you find that such was issued in accordance with the contract, is a direct admission by him as agent for the defendant, that the building was, at the time of issuance, completed in accordance with the plans and specifications, and the defendant is bound thereby, except in case of fraud or such gross mistake on the architect's part as would necessarily imply bad faith or a failure to exercise an honest judgment, or collusion between the architect and the plaintiffs. Fraud, bad faith and collusion are not to be presumed, and the burden of proving that fraud, bad faith, or collusion existed in the mind of the architect at the time of signing the certificate is on the one asserting its existence." It is objected that this instruction which coupled the court's view of the conclusiveness of the certificate with the maturity of the final payment under the contract was tantamount to a direction that if the jury should find that the certificate was issued "in accordance with the contract" it was an admission binding on the defendant that the amount certified to by the architect was due and payable to the plaintiffs unless the defendant had proven that the certificate was fraudulently issued. The objection is well taken. We think the certificate was no more than *prima facie* evidence that the contractors had done a certain amount of work which entitled them to receive the sum of \$55,102.39, and that upon their making certain repairs or remedying certain defects the building would be completed according to the plans and specifications and the contractors would be entitled to the additional sum of \$1500. The certificate contained nothing that could be construed as a representation that the building had been actually and finally completed in accordance with the contract. It, therefore, was not such a final and conclusive certificate as, we assume, was con-

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templated by the provision of the contract above quoted.

The judgment of the circuit court is reversed and set aside, and a new trial is granted.

W. B. Lymer (*Lindsay & Lymer* on the brief) for plaintiff in error.

M. F. Prosser and *A. M. Cristy* (*Frear, Prosser, Anderson & Marx* and *A. M. Cristy* on the brief) for defendants in error.

CHARLES REINHARDT *v.* COUNTY OF MAUI.

No. 961.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED SEPTEMBER 1, 1916.

DECIDED NOVEMBER 17, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

DAMAGES—*pain and suffering endured pendente lite—evidence.*

Where the plaintiff sues upon only one cause of action to recover damages for a personal injury received by reason of the defendant's negligence he may recover for pain and suffering endured by him after the action was commenced if the evidence shows that such pain and suffering were caused by the defendant's alleged negligence.

SAME—*medical services—evidence.*

In an action to recover damages sustained by reason of the defendant's negligence the plaintiff to recover for expenses incurred for medical services must show that such services were necessary and the charges therefor reasonable.

SAME—*Workmen's Compensation Act—negligence of third party.*

Where an employee is injured by reason of the negligence of

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a third party he may under the Workmen's Compensation Act bring an action against such third party to recover damages caused by such negligence.

COUNTIES—costs.

In an action against the county for personal injuries received by reason of a defective condition of a public highway the plaintiff cannot recover from the county expenses incurred in procuring evidence as section 2543 R. L. exempts counties from payment of costs.

EXCEPTIONS—*new trial*—*remitting portion of judgment*.

Where on exceptions to this court it appears from the record that the trial court improperly admitted evidence of items of expense incurred in certain particulars which probably were included in the judgment, no other error appearing, the appellate court will overrule the exceptions upon the condition that plaintiff within a given time remit that portion of the damages apparently recovered by reason of such erroneous evidence, and order that upon plaintiff's failure to remit such items of damage a new trial be granted the defendant.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff sued the defendant county for damages for an injury received through falling into a ditch upon and across the public highway. To the complaint the defendant filed a demurrer upon the ground that the defendant was not liable for injuries resulting from its failure to repair its highways. This demurrer was overruled by the trial court, and on interlocutory exceptions this court affirmed an order overruling the demurrer (*ante* p. 102). Thereafter the cause was submitted to the trial court, without a jury, upon the pleadings and proofs, the court deciding in favor of the plaintiff and assessing his damages at \$2,000. The cause comes here on exceptions to various rulings of the court and to the decision and judgment.

Exceptions 1, 2 and 6 relate to the action of the trial court in permitting the plaintiff to prove that he lost time from his occupation and suffered pain by reason of the

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accident after the complaint was filed, on the ground that such evidence was incompetent and immaterial. The court evidently admitted such evidence upon the theory that the injury received by the plaintiff was caused by an act of negligence on the part of the defendant and was based upon one and only one cause of action, upon which the plaintiff is entitled to recover damages to the date of trial which result directly from such injury. The common law ruling formerly obtainable limiting the plaintiff in a personal action to recover damages to such as occurred prior to the commencement of the action has been modified and damages sustained by reason of the cause of action sued on between the time of commencing the action and the trial thereof may also be recovered (8 R. C. L. p. 540, par. 92; 8 Am. & Eng. Enc. of Law, 2d ed., 680, and authorities cited in notes to the text).

Exceptions 3, 4 and 5 relate to the admission of evidence tending to show that the plaintiff after instituting the action expended moneys to the extent of some \$300 in traveling expenses and fees for medical services. It appears that a short time after the institution of the action the plaintiff went from Hana to Wailuku to consult Dr. Rothrock and obtain X-ray photographs showing his injuries; Dr. Rothrock having no X-ray machine plaintiff went from Wailuku to Hilo to consult Dr. Irwin, who had an X-ray machine and who could take the desired photographs, but who informed the plaintiff that he would not be able to attend the trial and testify; thereupon the plaintiff went from Hilo to Honolulu and from Dr. Straub obtained some X-ray photographs showing his injuries. Plaintiff received some medical services from both doctors Irwin and Straub and testified that he paid them more than \$200 for assistance. He also testified that his traveling and other expenses on these trips amounted to \$100. This evidence was objected to by the defendant on the ground that it was incompetent,

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irrelevant and immaterial, and on the further ground that the expenses incurred were expended in an effort to obtain evidence for the trial and that such expenses were incurred after the commencement of this action. Just how much was paid the physicians for medical services proper and how much for the X-ray photographs is not disclosed in the evidence, nor was there any evidence showing that the medical services were necessary or reasonable. It is apparent that such portions of the expenditure claimed as were incurred in attempting to obtain evidence are not competent, inasmuch as the defendant county is exempt from the payment of costs by reason of the provisions of section 2543 R. L. In the absence of a showing that by reason of his injuries, received in the manner alleged, the plaintiff necessarily traveled to Hilo and Honolulu to obtain medical services and that the charges therefor were reasonable and separate from the expense of obtaining the X-ray photographs to use as evidence, the evidence objected to was incompetent.

Exception 7 relates to the action of the court in admitting evidence tending to show that a street lamp was formerly located on the highway near the place where the accident occurred and that the same was removed a short time prior to the accident. The defendant objected to such evidence as incompetent, but as plaintiff testified that he knew of such light being near the gate of the witness Kaleo, to whose house he was going, and that he was looking for such light, this evidence explained why he passed Kaleo's house, and was competent for that purpose.

Exception 8 relates to the action of the court in admitting evidence that the county engineer and the road overseer in the district where the accident occurred were notified of and saw the washout in the road at the place where the accident occurred the day after the washout, in April preceding the accident. This evidence was introduced osten-

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sibly for the purpose of showing knowledge of the defect in the highway, which caused the injury, on the part of the agents and servants of the defendant and to bring knowledge home to the defendant of such defect. We think the evidence was properly admitted.

The remaining exceptions relate to the action of the court in denying the defendant's motion for a nonsuit and to the decision in favor of the plaintiff. The motion for nonsuit was based upon three grounds (1) that plaintiff was barred by the provisions of the Workmen's Compensation Act (Act 221 S. L. 1915) from maintaining this action; (2) that there is no allegation or proof that the supervisors of the County of Maui had any notice or knowledge of the defective condition of the road at the place where the accident occurred; (3) that the plaintiff was guilty of contributory negligence which precludes him from recovering against the defendant. We think the motion for nonsuit was properly denied. Plaintiff was not barred from suing the defendant by reason of being an employee of the Kaeleku Sugar Co., and by reason of such employment having to travel upon the highway where injured in discharging a duty to his employer. Upon this point the defendant cites two authorities, *Peet v. Mills*, 76 Wash. 437, and *Meese v. N. P. R. Co.*, 206 Fed. 222, both of which cases arose under the Workmen's Compensation Act of Washington, which act provides that an employee shall not maintain an action against third parties for an injury received while working in the employment of his employer. Section 5 of our Workmen's Compensation Act (S. L. 1915, p. 324) expressly provides that the employee in such case may elect to sue the third party or look to his employer for compensation. There is no evidence whatever showing that the plaintiff made a claim against his employer for the injury received or that he filed with the industrial accident board a claim for compensation on account of the injuries complained of, hence, on the record,

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we must hold that he elected to hold the third party responsible, and not look to his employer for compensation. It is unnecessary to decide in this case whether an employer is liable for compensation to an employee for an injury received by the latter while performing an act casually related to his employment off of the premises where the employer's business is conducted and we express no opinion as to such question. If the employer is liable under such circumstances, then under the Workmen's Compensation Act the employee has the right of election to proceed against the employer or against a third party whose negligence causes the injury. If the employer is not liable under such circumstances, the injured party can only look to the negligent third party for compensation. The evidence shows that a washout on the highway at the point where the accident took place occurred in April preceding the accident, leaving a trench or gulch more than twenty feet in width and more than twelve feet in depth in the highway; that the following day notice of the washout was brought home to the county engineer of the defendant and the road overseer of the district in which the highway was located and that the latter informed one of the supervisors of the defendant county of the washout three days after it occurred; that this defect was not remedied but the road was permitted by the defendant county to remain in that condition until the following August without guard rails, lights or other protection, when the plaintiff walked into the hole made by this washout during a dark night, without fault upon his part. The lapse of time from the occurrence of the washout until the injury to the plaintiff should raise the presumption that the supervisors of the county, charged with the duty of maintaining the highways of the county in a reasonably safe condition, should have known of such defect in the highway. There is evidence in the case of the

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bringing of such knowledge home to the officers of the county charged with the duty of repairing the highway, including one of the supervisors of the defendant county.

It may be that in estimating the damages of the plaintiff the court did not allow as an item thereof the traveling expense and fees paid to doctors at Hilo and Honolulu, yet, inasmuch as the court in its decision says that the plaintiff "was put to considerable monetary expense for medical treatment, etc.," we assume that it did allow as a part of the plaintiff's damages traveling expense and money paid to doctors Irwin and Straub to the extent of \$300, but which should not have been allowed under the evidence. We therefore have concluded to overrule the exceptions upon the condition that the plaintiff, within ten days from the filing of this opinion, file in the court below a writing, signed by him, or his attorneys, remitting \$300 of the judgment in his favor in this action, a duplicate of which writing shall be filed in this court within such time, otherwise the judgment of this court will be entered sustaining the exceptions and granting the defendant a new trial, and it is so ordered.

E. Vincent (*D. H. Case* with him on the brief) for plaintiff.

E. R. Bevins, County Attorney of Maui, for defendant.

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WAILUU v. KAINOAKUPUNA.

No. 952.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED AUGUST 30, 1916.

DECIDED NOVEMBER 21, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—cancelation of instrument.

In a suit in equity to obtain judgment canceling a deed it was alleged that the consideration moving to the plaintiff was defendant's promise to "sufficiently and comfortably support her during her natural life," and that defendant had failed and refused so to do; the evidence showed that defendant and his family had lived on the premises conveyed with the plaintiff for nearly four years after the execution of the deed, during which time defendant had furnished plaintiff with clothing and had furnished the food used; plaintiff occasionally complained that she did not get a sufficient amount of poi, but never so complained to the defendant; plaintiff finally left the premises without the knowledge or consent of the defendant, who wrote her asking her to return and testified that he had at all times supported, and has at all times been ready and willing and able to sufficiently and comfortably support, plaintiff in accord with her rank and station in life, pursuant to his promise so to do; held, that the plaintiff's suit is without equity and the judgment in her favor reversed with instructions to dismiss plaintiff's bill.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff filed her bill in equity to obtain a decree canceling a deed to certain lands made by her to the defendant. She alleges in her bill that the real consideration for the conveyance was the maintenance of herself by the defendant who agreed to furnish her with the necessities of life and "sufficiently and comfortably support and maintain

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her during her natural life;" that the consideration of \$500 expressed in the deed was not paid by defendant to her at any time; that the property conveyed was and is of the value of \$5000; that the defendant still holds the title to the said property by virtue of the said deed; and that the defendant, although often requested, has hitherto neglected and refused, and still does neglect and refuse, to support and maintain the plaintiff or to provide her with the necessities of life. The prayer is that process issue and that defendant be required to answer; that a temporary writ of injunction issue restraining the defendant from selling or disposing of the property conveyed by the deed or encumbering it *pendente lite*; that the deed be delivered up and canceled, and for such further relief as may be just. A copy of the deed is attached to and made a part of plaintiff's bill. The deed on its face is an absolute deed from plaintiff to defendant in which the only consideration expressed is the sum of \$500, the receipt of which is therein acknowledged.

The defendant filed his answer to the said bill in which he alleged that the said deed was made to him by the plaintiff of her own volition and not by request; that prior thereto he had expended on the property in building and repairing houses money to the extent of \$595, and had spent other sums in addition thereto which he is unable to state; that he advanced to the plaintiff at one time \$100 in money and at other times large sums; that the plaintiff and defendant did have a secret understanding that "he would provide her with all the necessities of life and sufficiently and comfortably support and maintain her during her natural life in accord and commensurate with her station in life;" that he did, from the date of the execution of the deed to the 24th day of December, 1914, provide the plaintiff with all the necessities of life, and did sufficiently and comfortably support and maintain her in accord with such

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secret understanding and agreement; that he denies that the property was or is in value greater than \$1500, and alleges that some of the property mentioned in the deed cannot be located; alleges that the plaintiff, yielding to the importunities and the entreaties of one Mrs. Waiau, did, on the 24th day of December, 1914, leave the home of defendant and go to reside with Mrs. Waiau; that he has not failed or refused to support and maintain the plaintiff in accord with their said secret agreement or understanding, but has been at all times and now is ready and willing so to do, and that defendant has not been requested by plaintiff to support and maintain her at any time.

The cause was heard by the circuit judge who rendered his decision in favor of the plaintiff, finding among other things that the sum of \$30 per month is a reasonable sum for the support and maintenance of the plaintiff; that there is due up to and including July 31, 1915, to plaintiff from the defendant the sum of \$247 for support and maintenance, and that the defendant pay the plaintiff such sum on or before August 15, 1915, and pay to the plaintiff thereafter, beginning September 1, the sum of \$30 monthly, payable the first day of each month, during the term of her natural life; that upon failure of the defendant to make any of the said payments his interest in the property should cease and an additional decree should be entered confirming the title of the plaintiff in and to the said property; that the amounts decreed to be paid by the defendant to the plaintiff shall be and are declared to be a lien upon the said property; that upon payment by the defendant to the plaintiff of all amounts due and to become due her title in said property should vest in him but not prior thereto, and that all said amounts should be paid by the defendant to the clerk of the court who should in turn pay the same to the plaintiff.

From the said decree the defendant has appealed and

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has assigned the following errors: "(1) The petition is not sufficient to support the decree rendered, or any decree; (2) the evidence is not sufficient to support the decree rendered; (3) the court has no power to cancel the deed or declare the same a mortgage; (4) the plaintiff-appellee's only remedy is the common law action for breach of covenant."

The only ground upon which the circuit judge, sitting as a court of equity, is asked to cancel the deed is the alleged failure of the defendant to support and maintain the plaintiff. Whether a court of equity should cancel a deed like the one in question upon the mere ground of failure of consideration, total or partial, is not necessary to a decision here, as, in our view, the allegations of the bill are not sufficiently established by the evidence, and the defendant's second assignment of error must be sustained. We will therefore only discuss the second assignment of error.

The allegations of the answer, supported by uncontradicted evidence, show that for three years before and more than three years after the execution of the deed the defendant supported and maintained the plaintiff. The plaintiff testified that the defendant had supported and provided for her properly for three years prior to the making of the deed. She complained that after the deed was executed she did not have a sufficiency of poi at times and was compelled to eat Japanese diet. Her evidence in this regard is corroborated by Anna Kalau. The circumstance that the plaintiff lived upon the premises and was supported by the defendant for a period of about three years and nine months after she executed the deed is important evidence that the defendant had kept his promise to support her and negatives the allegation of the bill that he failed to support and maintain her. The defendant and his older daughter both testified that after the execution of the deed and up to the

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time that the plaintiff left the premises the defendant provided the same kind of food for the plaintiff and in the same way that he had for the three years preceding the execution of the deed. The evidence shows that the defendant, when the deed in question was executed, had two pieces of land, one of which he had inherited and the other of which he had purchased. On both tracts of the defendant's land were two houses, and on one of them there were more than three acres of growing taro; that the defendant sent taro or poi from his own land to the place where the plaintiff and the children of the defendant lived twice a week; that they got fresh fish every time a peddler came around with fish, and when they did not have fresh fish the defendant would buy salt salmon at the stores. Plaintiff complained that the older daughter of the defendant quarreled at her and refused to let her have food; that this daughter had been made overseer of the house, or manager thereof by the defendant. On the other hand, the daughter and defendant both testified that plaintiff was in charge of the house and that the daughter acted under the plaintiff; that when anything was needed the plaintiff notified the defendant and he would either get it himself or send out and get it.

The plaintiff complained that the defendant brought to the house the Japanese husband of plaintiff's older daughter, after which she had to eat Japanese diet. There is no merit in this contention. Uncontradicted evidence shows that this daughter and Japanese married soon after the execution of the deed, after which time they lived upon the premises, and this Japanese husband of defendant's older daughter ate poi and other food as well as rice and vegetables. It seems somewhat incredible that it took the plaintiff more than three years to become dissatisfied with the diet furnished, after the deed was executed, upon the grounds on which she places it—that after the Japanese son-in-law

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of the defendant came to the premises she had to eat Japanese diet. There is some evidence to the effect that the involved property had been deeded by the plaintiff to a brother of hers and later that she deeded it to Mrs. Waiau, her sister-in-law, out of which litigation grew, and plaintiff testified that out of \$800 received by the defendant from the sale of the personal property conveyed to him by the deed he gave her \$100 and told her that he wanted the other \$700 for his lawyers in litigation growing out of said deeds. The defendant testified that he sold the cattle he received and used the money paying debts that plaintiff owed to different stores. The evidence of the plaintiff that she complained to the defendant that she was not receiving sufficient food or proper food is contradicted by the evidence of the defendant and by the circumstances. The evidence shows that the plaintiff left the premises without saying anything to the defendant about going or about her reasons for so doing, and as soon as the defendant learned that she had left and gone to Mrs. Waiau's he wrote to her and asked her to return. Plaintiff admitted having received this letter. The defendant testified that he gave the plaintiff pin money from time to time, the last time being in December, 1914, just before she left, when he gave her seven dollars, which he says is the least amount that he ever gave her at any time. The defendant testified that he made considerable improvements on the land deeded to him by the plaintiff, moving a house thereto, buying a water tank which cost \$50 besides freight and cartage, bought iron roofing, and built a storehouse and an addition to the residence, paying carpenters for work thereon \$180.

Defendant kept his promise for nearly four years after the execution of the deed, and when the plaintiff left the premises without his knowledge he promptly sent a letter to her asking her to return, and testified that he had been at all times ready and willing to support and maintain the

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plaintiff. Under the evidence the defendant has substantially complied with his agreement to support and maintain the plaintiff. He has, according to the evidence, although contradicted in part, placed her in charge of the house in which his children live, and in which he lives although absent therefrom a good part of each week, and whenever she expressed a desire to him for food or raiment he promptly responded. Under the evidence we hold that there is no equity in the plaintiff's suit.

The decree is reversed, and the cause remanded to the circuit judge with instructions to dismiss the plaintiff's bill. Costs are awarded to the defendant-appellant.

E. K. Aiu for plaintiff.

Andrews & Pittman for defendant.

MINNIE BAILEY BREDE AND CHARLES K. BAILEY
v. THE FIRST NATIONAL BANK OF WAILUKU,
A CORPORATION ORGANIZED AND EXISTING
UNDER AND BY VIRTUE OF THE LAWS OF
THE UNITED STATES OF AMERICA.

No. 982.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED NOVEMBER 20, 1916.

DECIDED NOVEMBER 24, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

WILLS—mortgage by remainderman—termination of mortgagor's estate.

B., by will, devised his real estate to his wife for life, and after her death certain portions to his son W. K. B.; the will provided that if any devisee should die before the testator's wife died the share which otherwise would have fallen to such devisee should

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go to his heirs; W. K. B. mortgaged the property so devised to him, after which he died prior to the death of the widow of testator, leaving children surviving him who are admitted to be his heirs: Held, that whatever estate W. K. B. took under the will terminated with his death and that his surviving children, as heirs, took free from any lien of such mortgage.

OPINION OF THE JUSTICES BY QUARLES, J.

This is a submission without action upon an agreed statement of facts of a controversy involving the construction of certain provisions of the will of Edward H. Bailey, deceased, and the force and effect of a certain mortgage. In the said will are the following provisions:

"I devise and bequeath all of my property of whatsoever nature, and wheresoever situate, and of which I may die seized and possessed either in my own name, or in the name of another in trust for me, unto my wife, Emily Bailey, for and during her natural life; she, during such period of time, to have the sole use and benefit of all rents, issues, and profits from time to time during her life accruing and growing out of said properties after the payment of all expenses and commissions.

"After the death of my said wife my property shall descend as follows:

"Unto my son, William K. Bailey, all those certain premises, with the improvements thereon, situate in Wailuku, County of Maui, Territory of Hawaii, located at the northeast corner of Main and High Streets, commonly known as and called the 'Bailey Block', and those certain premises, with the improvements thereon, situate in said Wailuku, located on the south side of Vineyard street, bounded on the west by what was formerly known as the Pae (now Miner) property, on the east by what was formerly known as the Malaihe (now Bailey) property, and comprising what is sometimes called the Mary Bal, the Lumelani, and the Wailuku Sugar Company pieces of land. * * *

"If any of the devisees hereinabove in this will named shall die before my wife dies I then direct that the share

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that would otherwise have fallen to such person shall descend to the then heirs at law of such person."

The testator, who owned the property mentioned in the clauses quoted, died in November, 1910. September 7, 1912, his son, William K. Bailey, named in said will, executed and delivered to the defendant bank a mortgage upon the property described as the "Bailey Block", to secure payment to the defendant of a certain sum of money. William K. Bailey died January 1, 1913, leaving two daughters and a son surviving him, to wit, the plaintiffs Minnie Bailey Brede and Charles K. Bailey, and Mary Bailey Holt. Mary Bailey Holt by deed has heretofore conveyed her interest in the property to the plaintiff Minnie Bailey Brede. The wife of the testator, Emily Bailey, survived the testator but died March 16, 1915. The plaintiffs claim to own the said property free from any lien or claim of defendant by reason of the said mortgage. The defendant claims to have a lien upon the said property for the amount of the said mortgage debt, which has never been paid. The questions submitted by the parties are:

"First: Did the plaintiffs, by reason of the circumstances hereinabove set forth, take an absolute fee simple title in said property?

"Second: Is said mortgage, by reason of the circumstances hereinabove set forth, a valid and subsisting charge or lien against said property?"

The provisions, which are here involved, in the will in question, are similar to those in Rooke's will, construed in *Rooke v. Queen's Hospital*, 12 Haw. 375, where the testator devised and bequeathed all of his property to his wife Grace, to be used and enjoyed by her during her natural life, and immediately after her death, to his adopted daughter Emma, to be used and enjoyed by her during her natural life and her children forever, with this proviso: "But should the aforesaid Emma Rooke decease before me, the said tes-

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tator, or decease without leaving any issue, then I hereby give and bequeath the same unto my nephew and godson, Creswell Charles Keane Rooke, * * * and his heirs forever." Rooke, the testator, died in 1858; his wife survived him, but died soon afterwards. Emma, who had married King Kamehameha IV, gave birth to a son, the Prince of Hawaii, who died in 1868. Emma died in 1885 leaving no issue surviving her. It was held that the Prince either took a "vested remainder" or that he and C. C. K. Rooke took "alternate contingent remainders," and that in either case "upon the death of Emma without leaving issue surviving her, C. C. K. Rooke became entitled in fee simple in possession, by way of executory devise or remainder as the case might be." Here the intention of the testator, Edward H. Bailey, who devised to his wife, Emily, a life estate only, is apparent. Whether it be held that the interest which William K. Bailey took is a vested remainder subject to defeasance upon his decease prior to that of the testator's widow, or whether it was contingent only, it is not necessary to determine here, as in either case, upon his death during the lifetime of Emily, the testator's widow, the estate devised to him terminated, and his surviving heirs took the fee simple title absolute free from any lien by reason of the said mortgage to the defendant whose rights and title under the mortgage terminated with those of the mortgagor.

A decree may be entered decreeing that the title in fee simple to the said described property covered by the mortgage is in the plaintiffs as against the defendant and that the defendant has no lien thereon by reason of the said mortgage.

C. F. Peterson for plaintiffs.

D. H. Case for defendant.

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WILLIAM K. RATHBURN v. JOHN PELE KAIO.

No. 967.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED NOVEMBER 22, 1916.

DECIDED NOVEMBER 28, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PARENT AND CHILD—*infants—liability of father for torts of minor child.*

At common law a father was not liable, merely because of the relation, for the torts of his child. And under R. L. 1915, Secs. 2375 and 2993, the father is responsible for the torts of a minor child only in case the child itself could be held liable.

INFANTS—*liability for negligence.*

An infant who has passed out of the realm of mere childish instincts may be held liable for the consequences of his negligence, but not where the negligence consists of a mere breach of contract.

STATUTES—*construction.*

If a literal interpretation of the language used in a statute would lead to palpable injustice the courts will search for a more reasonable meaning of the language which will also accord with the spirit of the enactment.

SAME—*statute in derogation of the common law.*

A statute in derogation of the common law is to be construed strictly, and the common law will be held not to have been further abrogated than the language of the act clearly requires.

OPINION OF THE COURT BY ROBERTSON, C. J.

It was alleged in the plaintiff's complaint that the plaintiff owned a certain automobile; that, with the knowledge and consent of the defendant, he employed the defendant's son, who was a minor about nineteen years of age, to drive said automobile between Honolulu and Kahuku, Island of Oahu; and that while driving said automobile between the points mentioned the defendant's son negligently drove it

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into the Waimea river and damaged it. Wherefore, the plaintiff claimed damages against the defendant for the injury. The court below overruled a demurrer to the complaint and allowed an interlocutory bill of exceptions.

At common law a father was not liable, merely because of the relation, for the torts of his child. 1 Cooley on Torts, (3d ed.) 180.

The plaintiff based his right to maintain the action upon the provisions of the Revised Laws, 1915, as follows:

"Except as otherwise provided, all persons residing or being in this Territory shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their wives, children under majority, or wards, by such offending party, or by his wife or his child under majority, or by his command, or by his animals, domital or *ferae naturae*; and the party aggrieved may prosecute therefor in the proper courts." R. L. Sec. 2375.

"The children of a valid marriage shall be denominated legitimate; and the husband of said marriage shall be liable for their suitable and proper support in all respects, until they severally attain the age of majority, when his liability shall cease for further provision. He shall also be entitled to control and manage his children in all respects during their minority, and require reasonable service at their hands. He shall be the natural guardian of their persons and of their property; he shall be liable in damages for tortious acts committed by them, and entitled to prosecute and defend all actions at law in which they or their individual property may be concerned." R. L. Sec. 2993.

The defendant's contention was and is that under those provisions the father of an infant is liable for the torts of his infant children only in those instances where, at common law, the infant itself would have been liable; that such has been the judicial construction, and the provisions have since been reenacted; and that as the alleged negligence in this case arose out of contract, the infant would not be liable in damages at common law, and, therefore,

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the father cannot be held liable in this action. In overruling the demurrer the circuit judge said, "I am unable to find, in either of these sections, any provision to the effect that the father's liability shall be limited to those cases wherein, by the common law, the minor himself would be liable. * * * But whether the minor be liable or not, it appears to me that the reading of the sections in question is so plain as to obviate the necessity of construction. * *

* Much as I deprecate the rule of law, unheard of in other jurisdictions, which these sections appear to impose within this jurisdiction, it is my duty to apply the law as I find it; and, as I find it, I regard it as establishing the liability of the defendant for the acts of his minor son."

The statutory provisions were originally enacted in 1846, and were carried, without material change in phraseology, into the civil code of 1859, the revision of 1905, and that of 1915. In the case of *Day v. Day*, 8 Haw. 715, decided *anisi prius* in 1891, Chief Justice Judd held that the father of an infant was not responsible under circumstances where the infant itself would not be liable. In that case the injury had been caused by the negligent act of an infant two years old. In *Victoria v. Palama*, 15 Haw. 127, decided in 1903, this court held that the father of a boy between seven and eight years of age was liable in damages for an injury caused by the negligent firing of a loaded gun. Under those circumstances, however, the infant himself could have been held liable, and the question whether the responsibility of the father under the statute was limited to cases where the child would be liable was not involved in that case. The rule is well settled that where a statute has been reenacted after it has received a judicial construction the reenactment carries with it that construction. *Territory v. Pacific Coast Casualty Co.*, 22 Haw. 446, 453; *Territory v. Overbay*, ante, 91, 95. The rule is based on the presumption that the legislature knew of the construction and assented to it.

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Wyatt v. Bd. of Equalization, 74 N. H. 552, 569. Whether a ruling made in a single case by an inferior court amounts to such a "known," "fixed," "settled" or "authoritative" judicial construction within the meaning of the rule as it has variously been phrased may be open to doubt. In Mississippi the rule has been stated to be that the former construction follows a reenacted statute when given by the "highest court" of the State. *Henry v. Henderson*, 60 So. 33, 40. However that may be, we are of the opinion that the statutory provisions in question were properly construed in *Day v. Day*, and that they were not intended to impose upon the father of an infant a responsibility where, at common law, none rested upon the child. We believe the object of the legislature in making the enactments was to extend the remedy for the benefit of persons injured by the tortious acts of infants so as to be more likely to produce adequate pecuniary results than would a judgment only against a probably impecunious child, but not to create liability where none at all existed before. As pointed out by the circuit judge, a literal interpretation of the provisions would not permit of such a limitation upon the father's liability. But if following the strict letter of a statute will lead to palpable injustice the courts search for a more reasonable meaning of the language which will also accord with the spirit of the enactment. *Shillaber v. Waldo*, 1 Haw. 31, 38; *Chong Yet You v. Rose*, ante, 220, 222; 36 Cyc. 1108. A statute which imposes upon a father liability to respond in damages for every tort committed by his child irrespective of the age of the infant or the circumstances under which the act or omission occurred, and whether or not, upon just principles, the infant could be held liable, would permit of gross injustice. The provisions in question cannot be regarded as acts merely remedial in character and so entitled to a liberal construction. They purport to impose a liability upon and to give a right of action against the fathers of minor children where none previously existed and under

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circumstances even where no fault could be implied on the part of the parent. They are in derogation of the common law, and, therefore, subject to a strict construction. *Maguire v. Tong Wo*, 5 Haw. 41; *Lewers & Cooke v. Wong Wong*, 22 Haw. 765. "Statutes changing the common law are strictly construed, and it is not further abrogated than the language of the statute clearly and necessarily requires." Lewis' Sutherland, Stat. Con., p. 1060.

Under the circumstances set forth in the plaintiff's complaint there would be no right of action against the defendant's son since his negligence constituted a breach of his contract with the plaintiff, the gravamen of the action, notwithstanding its form, would be the breach of that contract. An infant who has passed out of the realm of mere childish instincts may be held liable for the consequences of his negligence as a person of full age might be, but not where the negligence consists in the mere breach of a contract, for to permit liability in that case would be to deprive the infant of the protection which the law gives him in matters of contract. 1 Cooley on Torts (3d ed.) 179, 181; *Isenberg v. Cummins*, 8 Haw. 237; *Lowery v. Cate*, 108 Tenn. 54; *Caswell v. Parker*, 96 Me. 39; 22 Cyc. 621.

We hold, therefore, that as, upon the facts alleged, the plaintiff could not maintain an action against the defendant's son, he may not maintain this action against the defendant. The court below erred in overruling the demurrer.

The exceptions are sustained and the case is remanded to the circuit court.

W. C. Achi for plaintiff.

L. Banigan (*Smith, Warren & Sutton* on the brief) for defendant.

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TERRITORY *v.* THERESA O. K. W. BELLIVEAU,
ROBERT W. WILCOX AND Y. AHIN.

No. 977.

MOTION TO DISMISS.

ARGUED DECEMBER 5, 1916.

DECIDED DECEMBER 12, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*criminal procedure—writ of error by Territory.*

A writ of error at the instance of the Territory, under R. L. 1915, Sec. 2520, will not lie in a case where a demurrer to an indictment was sustained on the ground that the indictment was defective merely upon principles of criminal pleading.

SAME—*statute upon which indictment founded.*

Statutes relating to the form and sufficiency of indictments are not statutes "upon which the indictment is founded" within the meaning of R. L. 1915, Sec. 2520.

OPINION OF THE COURT BY ROBERTSON, C. J.

There was an indictment charging the defendants with having committed the offense of conspiracy in the first degree, to which the defendants interposed a demurrer. The circuit court sustained the demurrer, whereupon the Territory obtained a writ of error under Sec. 2520, R. L. 1915. The defendants have filed a motion to dismiss the writ on the ground that this court is without jurisdiction in the matter since the decision of the circuit court involved only the application of the rules of criminal pleading and was not based upon the invalidity or construction of the statute upon which the indictment was founded within the meaning of section 2520.

It was alleged in the indictment that the defendants "did unlawfully, maliciously, fraudulently, knowingly and feloniously combine, mutually undertake and conspire to-

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gether to do what is and was obviously and directly wrongfully injurious to another, to wit, knowingly, fraudulently, deceitfully and with intent to defraud by false and fraudulent pretenses to obtain the signature of one Solomon K. Kauai to a certain written instrument, to wit, a deed of certain rights, title and interest of the said Solomon K. Kauai in and to certain lands, tenements, hereditaments and fishing rights, situate, lying and being in the city and county of Honolulu, Territory of Hawaii, and in and to lands and waters situate in, adjacent to and within the jurisdiction of said city and county of Honolulu, Territory of Hawaii, the false making of which said written instrument would be punishable as forgery, the said rights, title and interest of the said Solomon K. Kauai, in and to the said lands, tenements and hereditaments and rights, being of the value and worth of more than the sum of Two Hundred Dollars (\$200.00), and did then and there and thereby commit the crime of conspiracy in the first degree, contrary to the form of the statute in such case made and provided."

Conspiracy is defined as "a malicious or fraudulent combination or mutual undertaking or concerting together of two or more, to commit any offense or instigate any one thereto, or charge any one therewith; or to do what plainly and directly tends to excite or occasion offense, or what is obviously and directly wrongfully injurious to another." R. L. 1915, Sec. 4076. A conspiracy to forge, counterfeit or cheat to an amount exceeding one hundred dollars is in the first degree. R. L. 1915, Sec. 4084. Section 3989 provides that "Whoever shall, by any false pretense, and with intent to defraud, obtain the signature of any person to any written instrument, the false making whereof would be punishable as forgery, is guilty of gross cheat." The indictment purported to charge conspiracy to commit gross cheat.

The demurrer was based on the grounds that (1) the indictment does not state facts sufficient to constitute the

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crime of conspiracy in the first degree, or any other offense, and (2) the indictment is ambiguous and uncertain in that it does not allege with sufficient legal precision that Solomon K. Kauai was the owner of the lands mentioned in the indictment, and that the lands are not described or identified. The court below held that the party whom the defendants conspired to injure and defraud should have been named in the indictment, also that the pretenses used and their false and fraudulent character should have been set forth, and sustained the demurrer evidently on the first ground though the opinion does not expressly so state. The question is a rather close one whether the ruling was the mere application of general principles of criminal pleading, or whether it involved statutory construction.

Section 2520, which was taken from the federal criminal appeals act of March 2, 1907, provides, *inter alia*, that the prosecution may have a writ of error to review a decision or judgment sustaining a demurrer to an indictment "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." The "statute upon which the indictment is founded," in this case, includes section 3989, relating to gross cheat, as well as sections 4076 and 4084, relating to conspiracy in the first degree. See *United States v. Keitel*, 211 U. S. 370. Where a demurrer has been sustained on the ground that the indictment was defective merely upon general principles of pleading a writ of error will not lie. *United States v. Stevenson*, 215 U. S. 190, 195; *United States v. Carter*, 231 U. S. 492. Such is the case also where the ruling amounted only to an interpretation of the indictment. *United States v. Winslow*, 227 U. S. 202, 217; *United States v. Pacific & Arctic Co.*, 228 U. S. 87, 108. If it cannot be ascertained from the record what the ground of the ruling was the writ will be dismissed. *United States v. Moist*, 231 U. S. 701. But it has been held by the supreme court in

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several cases that where the decision was that the acts charged in the indictment did not constitute a violation of the statute upon which the indictment was founded the ruling necessarily involved the construction of the statute. *United States v. Patten*, 226 U. S. 525, 535; *United States v. Birdsall*, 233 U. S. 223, 230; *United States v. Nixon*, 235 U. S. 231, 236.

We think that this case falls within the category of cases decided upon the general principles of criminal pleading, and not upon statutory construction. The ruling of the court was, in substance, that the indictment did not show a conspiracy in violation of the statutes; the reasoning of the judge, as disclosed by his opinion, however, proceeded upon the idea, not that the facts sought to be alleged would not constitute the offense, but that they were not set forth with the particularity and definiteness required by the general rules of pleading.

On behalf of the Territory it is contended that the ruling of the trial court was clearly wrong in view of certain of the provisions of Act 215 of the Session Laws of 1915, and of section 3795 of the Revised Laws, relating to the sufficiency in form of indictments; that those provisions, whether called to the court's attention or not, must be held to have been misconstrued, or held invalid; and that this writ may be maintained on that ground. We are unable to take that view. We are of the opinion that the remedial statutes referred to, which were designed to change the common law rules governing criminal pleading, are not statutes "upon which the indictment is founded" within the meaning of section 2520. We do not believe it was the purpose of the last mentioned enactment to give the government a right of review in cases of alleged error in the application of the rules of pleading even though they be contained in statutory enactments. The question whether there was error in that respect is not before us. Ordinarily an objec-

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tion to the form of an indictment can be met in a new indictment. But such is not the case where an indictment free from technical defects has been set aside because of the misconstruction or supposed invalidity of the substantive statute upon which it was based. It was under the latter situation that the legislature intended to provide for a review at the instance of the government.

The writ is dismissed.

J. T. DeBolt for the motion.

W. T. Carden, Second Deputy City and County Attorney,
contra.

L. TENNEY PECK *v.* CHARLOTTE D. I. STEERE.

No. 979.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED NOVEMBER 27, 1916.

DECIDED DECEMBER 12, 1916

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EJECTMENT—*estoppel*.

In ejectment by the second assignee of a lease the plaintiff is estopped by the oral promise of his assignor to the lessor, in consideration of the latter's necessary consent to the assignment, to take only a part of the leased premises, where, pursuant to such promise the consent was given and the part relinquished leased to the defendant.

ESTOPPEL—*landlord and tenant—parol agreement*.

W desired to procure the assignment of a lease; the written consent of the lessors was necessary to the assignment; W agreed with the lessors in advance that if they would consent to the assignment he would take the leased premises less a certain portion; the lessors consented in writing and the lease was assigned

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to W; the boundaries were changed so as to exclude the portion agreed to be relinquished, and lessors leased such portion to the defendant; W assigned, with the written consent of the lessors, the lease assigned to him by B, to the plaintiff; the defendant, prior to commencement of action in ejectment by plaintiff, had fenced the portion which W agreed to relinquish. Held: W's promise estopped him from claiming the land in controversy, and that plaintiff is in no better position than was his assignor.

EVIDENCE—*proving matter in estoppel by parol.*

Parol evidence is admissible to establish acts and declarations made by a party under such circumstances as will in equity estop him from denying such acts and declarations.

OPINION OF THE COURT BY QUARLES, J.

This is an action of ejectment tried in the circuit court of the first circuit, jury waived, the decision and judgment being in favor of the defendant. The facts may be briefly summarized as follows: The plaintiff claims a tract of land designated as lot B at Kahala, leased by L. G. Blackman and James W. Pratt to A. M. Brown, assigned by Brown to W. C. Wilder, and assigned by Wilder to the plaintiff. The defendant claims an adjoining tract designated as lot A, together with a triangle out of the southeast corner of lot B, said triangle designated by lines and corners on a plat annexed to the plaintiff's complaint by the letters "C," "D" and "E." The lease to Brown is dated June 14, 1910, and was recorded in the registrar's office June 30, 1910, and by its terms is not assignable without the written consent of the lessors. The latter part of September, 1910, Mr. Wilder was negotiating with the lessors for their consent to an assignment of the lease by Mr. Brown to him, and at the same time the defendant was negotiating with Blackman and Pratt for a lease of the land covered by lot A and the said triangle out of lot B. The lessors, through Mr. Pratt, agreed with Mr. Wilder that if he would take the land covered by the lease to Brown, less the triangle

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in dispute, the lessors would consent to the assignment by Mr. Brown, and to this Mr. Wilder agreed. September 30, 1910, the lessors assented in writing to the assignment by Mr. Brown to Mr. Wilder and the assignment was then made. The following day the lessors made a lease to the defendant of the said lot A, including the triangular piece out of lot B, which is in controversy here, and which lease was later acknowledged and thereafter, on January 20, 1911, was recorded in the office of the registrar of conveyances. Prior to the assignment to Mr. Wilder the boundary monument marking the southwest corner of lot B was moved from point "C" to point "D" whereby the triangle in dispute was taken out of the external boundaries of lot B, as marked on the ground, and embraced within the boundaries of lot A, as marked upon the ground. Prior to the institution of this suit the defendant constructed a stone wall inclosing the land covered by the triangle in dispute and was in actual possession of the same at the commencement of this action, claiming it under the lease to her. Still later Mr. Wilder desired to sell his interest in the lease assigned to him by Mr. Brown, and Mr. Pratt, one of the lessors, acted as his broker and negotiated a sale to the plaintiff. Mr. Pratt testified, and the trial court so found, that he pointed out on the ground to the plaintiff the boundaries of the land that he would get under the assignment of the lease by Mr. Wilder if he should take over, and that in doing so the triangle in dispute was taken out. Mr. Peck controverted this in part and corroborated it in part. Under the negotiations between Mr. Pratt and the plaintiff the latter took an assignment from Mr. Wilder of the Brown lease. The consideration of Mr. Wilder's agreeing to take the land under the Brown lease, less the triangle in controversy, as found by the trial court, was the written consent of the lessors to the assignment from Mr. Brown to him.

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The plaintiff objected to the introduction of evidence showing that Mr. Wilder agreed to take the land less the triangle in dispute; to evidence showing the changing of the boundary monuments; and to evidence showing that the boundaries were pointed out to the plaintiff on the ground, for the reason that all of said evidence was incompetent in that it was an attempt to prove an oral surrender which is void under the statute of frauds, on the ground that it was an attempt to vary the terms of a written agreement by parol evidence, and on the further ground that there was not, in law or in fact, a release of the land covered by the triangle in dispute by Mr. Wilder, but only his agreement in advance so to do. All of these objections were overruled by the trial court, which found the facts substantially as above stated, and held under the circumstances proven that the assignment of the Brown lease to the plaintiff with the written consent of Blackman and Pratt, and the lease from Blackman and Pratt to the defendant, were interdependent and correlated acts; that the plaintiff is in no better position than was his assignor Wilder; that the plaintiff had actual and constructive notice of the conditions existing when he took the assignment of the Brown lease and is estopped from claiming the triangle in dispute. The findings of the trial court being upon conflicting evidence, and there being evidence to sustain the findings, they are binding upon this court.

The exceptions before us are to the admission of the evidence objected to, to the decision of the court in favor of the defendant, and to the denial of a motion for new trial by the plaintiff. A correct answer to the questions involved by the various exceptions depends upon the determination of the contention of the plaintiff that under the facts proven and found by the trial court the lease under which the plaintiff claims covers all of the land therein described; that such lease was not affected by the transactions between

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the lessors and his assignor Wilder or by the lease to the defendant, the attempt to orally surrender the lease being within the statute of frauds and void. To sustain this contention the plaintiff cites the following authorities: *Kamaleule v. Nagamoto*, 9 Haw. 384; 24 Cyc. 1366; 20 Cyc. 218, 219; Taylor's Landlord and Tenant (8th ed.), Sec. 509, and Washburn on Real Property (5th ed.), 579.

In the case in 9 Haw., cited above, it is held that to constitute a surrender of a lease by operation of law there must be a change of possession by consent of the parties inconsistent with the continued existence of the lease, "as where the tenant accepts from his landlord a new lease inconsistent with the old, or where the landlord accepts a new tenant with the consent of the old, or where by mutual consent the tenant yields and the landlord resumes possession." In 24 Cyc., at page 1366, it is said: "A surrender, as the term is used in the law of landlord and tenant, is the yielding up of the estate to the landlord so that the leasehold interest becomes extinct by mutual agreement between the parties. The rescission of a lease, when by express words, is called an express surrender or a surrender in fact; and when by acts so irreconcilable to a continuance of the tenure as to imply the same thing it is called a surrender by operation of law. * * * An express surrender, sometimes called a surrender in fact, as distinguished from a surrender by operation of law, is usually required to be in writing. No particular form of words is necessary, nor is it required that there should be a formal delivery or cancellation of the deed or instrument which created the estate to be surrendered. All that is necessary is the agreement of the proper parties manifesting such an intent followed by a yielding up of possession to the lessor. There must, however, be a consideration for the surrender." In 20 Cyc. 218, 219, it is said: "In jurisdictions where the English statute is followed an oral surrender of any lease is inoperative."

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In Taylor's Landlord and Tenant, Sec. 509, the learned author lays down the rule that the surrender to be effective *per se* must be in writing, but, in closing the section, says: "But an unconditional agreement between a landlord and a third person with the assent of the tenant, during the term, to rent the premises to such third person, followed by a change of possession and the payment of rent by the new tenant, will amount to a valid surrender of the old lease, and an acceptance thereof on the part of the landlord." In Ch. X, Sec. 7, Washburn on Real Property (5 ed.), beginning at page 579, the author, upon both English and American authority, considers the question of a surrender of a lease in the same view as the authorities hereinbefore cited. At page 585 he cites from Parke, B., in *Lyon v. Reed*, 13 M. & W. 306, as to what constitutes a surrender by operation of law, as follows: "We must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is, by law, afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender." In *Dennis v. Miller*, 68 N. J. L. 320, the court, speaking of an oral agreement to surrender, said: "While executory only, the agreement of surrender was, of course, not enforceable, but when executed it became legally effective." In *Goldsmith v. Darling*, 92 Wis. 363, the court, *inter alia*, said: "The learned counsel for appellants are in error in respect to proving by parol the surrender of a written lease. The rule of law invoked does not go to the extent of prohibiting proof by parol of a verbal agreement to surrender, but only that such an agreement does not, *per se*, effect such surrender and a cancellation of the lease. * * * But the same authorities also hold, and it is elementary, in fact, that a verbal agreement to surrender, acted upon by an

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actual surrender and acceptance, is sufficient to cancel the lease."

While a surrender of a lease by the lessee to his landlord is not effective *per se* unless in writing the surrender takes place under an oral agreement by operation of law where the landlord in pursuance of such an agreement takes possession of the demised premises or leases the same to another tenant who takes possession thereof. The agreement of Mr. Wilder to take the premises demised by the Brown lease, less the triangle in dispute, accepted by the lessors, as shown by the change of boundaries, so closely followed by the lease to the defendant, if not a surrender by operation of law, as contended by learned counsel for the defendant (see *Beall v. White*, 94 U. S. 382, 389), of the triangle in dispute, estopped the plaintiff's assignor from claiming the same. To permit an intending assignee of a lease to procure and enjoy the benefits of the necessary written consent of his lessor to the assignment to him in consideration of his promise to take only a portion of the demised premises and then repudiate such promise would be abhorrent to the principles of equity. While the facts are different from those in the case of *Goo Kim v. Holt*, 10 Haw. 653, the principle of estoppel there applied is applicable here. Under the facts established by the evidence, and found by the court, plaintiff's assignor was estopped from claiming the triangle in controversy. His assignee, the plaintiff, is in no better position than he was in, and, as the trial court correctly held, is estopped from claiming the triangle in controversy. Parol evidence is admissible to establish acts and declarations made by a party under such circumstances as will in equity estop him from denying such acts and declarations.

Robertson, C. J., concurring.

The exceptions are overruled. Costs awarded to the defendant-appellee.

A. Lindsay, Jr., for plaintiff.

Castle & Withington for defendant.

CONCURRING OPINION OF ROBERTSON, C.J.

There was not an express surrender, and I think the evidence does not show a surrender by operation of law. Wilder did no act as tenant which was inconsistent with the continuance of the tenancy as to the whole lot. But Wilder's statement to Pratt to the effect that if Blackman and Pratt would consent to the assignment to him of the lease by Brown he would give up that portion of lot B lying westerly of the line D-E was equivalent to a representation that on that being done he would not thereafter make any claim to the strip beyond that line and that Blackman and Pratt could thereafter do what they pleased with it so far as he was concerned. The representation having been acted upon and the consent given, the case presents an equitable estoppel within the principle of *Goo Kim v. Holt*, 10 Haw. 653. True, Wilder at that time had no interest in the land, but he acquired an interest by the very transaction of which his representation formed a part. The estoppel affected Wilder's assignee, the plaintiff, and operated in favor of the assignee of Blackman and Pratt, the defendant. *Dickerson v. Colgrove*, 100 U. S. 578.

Syllabus.

TERRITORY OF HAWAII, FOR THE USE AND BENEFIT OF THE COUNTY OF MAUI, *v.* EDMUND H. HART, W. L. DECOTO, PATRICK COCKETT, F. F. BALDWIN AND W. T. ROBINSON.

TERRITORY OF HAWAII, FOR THE USE AND BENEFIT OF THE COUNTY OF MAUI, *v.* EDMUND H. HART, W. T. ROBINSON AND A. GARCIA.

No. 971.

ERROR TO CIRCUIT JUDGE, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED DECEMBER 11, 1916.

DECIDED DECEMBER 15, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—*construction—repeal of special provision.*

Where a statute prescribes a special rule applicable to a certain class and there is another statute which prescribes a general rule applicable to all but the excepted class the repeal of the special statute will render the general statute applicable to the class formerly excepted.

SAME—*application of new remedy for enforcement of pre-existing right.*

A statute relating to procedure and giving a new and additional remedy may be applied to the enforcement of the obligation of a contract which was entered into prior to the enactment of the statute.

OFFICERS—*official bonds—clerks of circuit courts.*

After the repeal of section 60, Chap. 57, S. L. 1892, circuit judges were authorized to require the clerks of their respective courts to give bonds for the faithful performance of their duties under the act of October 4, 1894 (R. L. 1915, Sec. 150) and upon breach of condition thereof the obligation could be enforced by the summary procedure authorized by section 149, R. L. 1915.

OPINION OF THE COURT BY ROBERTSON, C.J.

The Territory, for the use and benefit of the county of

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Maui, filed in the court below. two motions of the same purport praying that it be permitted to prove breach of condition of two bonds given by the respondent Hart for the faithful performance of his duties as clerk of the circuit court of the second judicial circuit, and that judgment for the amount of the resulting damage be entered against said Hart and his sureties, the other respondents. The procedure is that authorized by R. L. 1915, Sec. 149. In one motion it was alleged that Hart was appointed clerk of said court on August 1, 1911, by Hon. S. B. Kingsbury, then judge of said court, and in compliance with the requirements of the law and of said judge gave a bond in the form prescribed by statute for official bonds (R. L. 1915, Sec. 139) with the respondents Decoto, Cockett, Baldwin and Robinson as sureties; that during the continuance in office of said Hart and the term of said bond said Hart failed to pay over and account for certain moneys which came into his possession by reason of his office; and that though demand had been made upon the respondents for the amount of their liability under the bond they had failed to make payment. In the other motion it was alleged that Hart was appointed to said office on September 1, 1914, by Hon. W. S. Edings, judge of said court, and that the sureties on the bond given at that time were the respondents Robinson and Garcia. In the one case the respondent Robinson and in the other case the respondents Robinson and Garcia interposed a plea to the jurisdiction. The grounds of each plea were, in substance, that the proceeding was based on a bond the making of which was not required by law; that there is no provision of law permitting or requiring the giving of official bonds by clerks of the circuit courts; and that the proceeding is an attempt to sue upon a contract for more than twenty dollars without preserving to the respondents the right of trial by jury as required by the Seventh Amendment of the Constitution. The pleas, which

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were heard together, were sustained by the circuit judge, and the Territory brings the matter here upon writ of error.

The proceedings evidently were commenced upon the theory that the bonds in question were authorized by section 150 of the Revised Laws which reads as follows:

“In every case where bonds for the faithful performance of duty are not required by law of officers or employees in any department or bureau of the Territory, the head of the department or of the bureau, as the case may be, may require every such officer or employee to give a bond for the faithful performance of his duties.”

That provision was originally enacted on October 4, 1894, at a time when there was in force a special provision requiring the giving of bonds by the clerks of the supreme and circuit courts (S. L. 1892, Ch. 57, Sec. 60). And the first point sought to be made by counsel for the defendants in error is that the enactment of 1894, as shown by its wording, was not intended to apply to clerks of court since they were dealt with in the special provision referred to, and as such clerks were not within the purview of section 150 when it was first enacted they must be held to be not within its purview now notwithstanding that the provision of 1892 (R. L. 1905, Sec. 1682) was expressly repealed by Act 84 of the Session Laws of 1911. The contention is that since then there has been no statute authorizing the requiring of bonds of the clerks of the circuit courts. In view of the allegation that the bonds in suit were required by the circuit judge we will not inquire whether they could have been required, or might be regarded as having been required, by the governor under section 145 or by the chief justice under section 143 of the Revised Laws. The special provision of the act of 1892, while it remained in force after the enactment of the general provision of 1894, in effect constituted an exception to the general provision. And the rule is that “Where a provision which excepts a class or specified locali-

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ties from the operation of the act is repealed, the law operates generally over the excepted class or localities." 1 Lewis' Sutherland, Stat. Con. (2nd ed.) Sec. 295. *Pushor v. Morris*, 53 Minn. 325; *Grand Isle v. Milton*, 68 Vt. 234; *Smith v. Hoyt*, 14 Wis. 273; *In re Schooner Henrietta*, 10 Haw. 241, 244. This is not the reviving of a repealed statute in contravention of section 20 of the Revised Laws. *In re Schooner Henrietta*, *supra*; *Pepin Tp. v. Sage*, 129 Fed. 657; *Dykstra v. Holden*, 151 Mich. 289. It undoubtedly was the view of the legislature when, in 1911, it repealed the enactment of 1892, that the elaborate and detailed act of 1905 as amended in 1907 and 1909, now sections 138 to 149 of the Revised Laws, and the act of 1894, which remained in force, so fully and completely covered the entire subject of official bonds, that the special provision of the 1892 act was no longer necessary. The object of this legislation to require the giving of bonds by certain principal officers and to authorize their being required from any or all subordinate officers is so obvious that there is no room for a supposition that the clerks of the circuit courts whose duties, after as well as prior to the repeal of the provision of 1892, included the receipt of moneys, could not be required to give bonds for the faithful performance of their duties. We hold that the circuit judge is the head of a "department or bureau," and that the clerk of his court is an "officer or employee" therein within the meaning of section 150 of the Revised Laws, and that the bonds in question could properly have been required to be given by the clerk as, it is alleged, they were required and given.

The next contention which has been urged on behalf of the respondents is that even if the taking of these bonds was authorized by the act of 1894, the summary procedure upon breach of condition authorized by section 149 does not apply to them because at the time of the first enactment of that section (1905) it applied only to bonds given in accord-

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ance with the provisions of the statute of which it was a part and it is only since the enactment of the revision of 1915 that it could be held to apply to bonds given pursuant to the act of 1894, and that these bonds, as stated, were executed prior to 1915. The contention is not sustained. The enactment of the revision of 1915 included the act of 1894 with section 149 in chapter 17 of the revision and made the summary remedy applicable to all bonds "prescribed or authorized" by that chapter, and there is no legal obstacle to its application to these bonds if, as alleged, their conditions have been broken, even though they were executed previously. A provision in the act of 1907, amendatory of the act of 1905 (R. L. 1915, Sec. 143), prescribed that "whenever by law otherwise than in this act it is provided that any officer, clerk, assistant officer or other employee in any office or department of the government give an official bond such officer, clerk, assistant officer or other employee shall hereafter execute such bond under and in accordance with and in the form provided by this act." The form referred to provides for a clause that in the event of a breach of condition the obligation "may be enforced in any manner or by any proceedings authorized by law," and the bonds in suit contain that clause. This would seem to authorize the application of such new remedy as might have been provided by statute. It is well settled that a statute giving an additional remedy to the party entitled to performance of a contract which does not take away any substantial right of the other party does not impair the obligation of the contract sought to be enforced. *Bernheimer v. Converse*, 206 U. S. 516, 530. "Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions. * * * A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist." 2 Lewis' Sutherland, Stat. Con. (2nd ed.) Sec. 674. See also *Bierce*

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v. *Waterhouse*, 219 U. S. 320; *Coosa River S. Co. v. Barclay*, 30 Ala. 120; *Straw etc. Co. v. Kilbourne B. & S. Co.*, 80 Minn. 125; *Persons v. Gardner*, 59 N. Y. S. 463. The rule was applied in an early case in Alabama, *Wheat v. State, Minor* (Ala.) 199, where a summary proceeding was brought to enforce the condition of a tax collector's bond, the bond having been given before the passage of the statute under which the proceeding was instituted. We hold that the procedure authorized by section 149 applies to the bonds here involved.

What has been said disposes of the point raised by the pleas that the respondents are entitled to a trial by jury as to their liability, counsel having conceded that if it should be held that the bonds were authorized by law and subject to the summary procedure provided by the statute, the proceedings were properly brought. A statutory proceeding for the enforcement of the obligation of an official bond is not a suit at common law within the meaning of the Seventh Amendment. 27 Am. & Eng. Enc. Law 378; 15 Enc. Pl. & Pr. 166.

The orders sustaining the pleas to the jurisdiction are reversed, and the cases remanded to the circuit judge for further proceedings.

E. R. Bevins, County Attorney of Maui, for plaintiff in error.

Lorrin Andrews (*Andrews & Pittman* on the brief) for defendants in error.

Syllabus.

M. T. TEVES *v.* H. B. READE; CITY AND COUNTY
OF HONOLULU, GARNISHEE.

No. 976.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED NOVEMBER 28, 1916.

DECIDED DECEMBER 15, 1916.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MUNICIPAL CORPORATIONS—*auditor—issuance of warrant.*

In the absence of a showing of fraud, or dispute as to the amount found by the board of supervisors to be due, the auditor of the city and county of Honolulu is without authority to refuse to issue a warrant drawn by him in payment of a claim duly allowed and ordered paid by the board of supervisors.

WORDS AND PHRASES—"any person."

The words "any person," as used in Sec. 2801 R. L. 1915, relating to garnishment, include municipal corporations.

GARNISHMENT—*municipal corporations—public policy.*

Public policy may demand that a sum set apart for the erecting or making alterations and additions to a public building should not be liable to garnishment during the progress of the work, for the debt of the person contracting to do the work, for that might prevent its completion; but when the work is finished and the money has been earned and is standing to the credit of the contractor with the municipal corporation, it should be subject like any other property to the payment of his debts. The cases of *Laredo v. Nalle*, 65 Tex. 359, and *Pringle v. Guild*, 118 Fed. 655, cited and followed.

SAME—*same—liability as garnishee.*

Under the facts in this case, held, that a municipal corporation, like an individual or private corporation, is subject to the process of garnishment for an ordinary debt due by it to a third person.

OPINION OF THE COURT BY WATSON, J.

This is an action of assumpsit brought by M. T. Teves

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against H. B. Reade, defendant, and the city and county of Honolulu, garnishee. From a judgment in favor of the plaintiff for \$66.14, and holding the garnishee liable for that amount the city and county took an appeal to this court on points of law. The facts, as set out in a lengthy written disclosure filed by the garnishee, may be summarized as follows: that defendant Reade had a contract with the city and county of Honolulu to do certain work and make certain alterations and additions to the electric light plant of the city and county; that incorporated in the said contract as paragraph 36 of the specifications, attached to and made a part of the contract, the contractor covenanted and agreed as follows:

"36. Claims. The contractor agrees that he will furnish satisfactory evidence that all persons, firms or corporations who have done work or supplied material under these specifications have been paid or satisfactorily secured before the contractor shall be entitled to final payment.

"In case such evidence is not furnished, or in case any claim, suit and or action for compensation, damage or otherwise, be filed against the city and county or against the contractor by reason of the work performed or to be performed under the plans, specifications and or contract, the city and county may retain from the moneys due or to become due to the contractor sufficient sum or sums fully to protect itself from loss, charge or expense by reason of said claims, suits and or actions until the contractor shall have completely and satisfactorily settled and or terminated said claims, suits and or actions,—the city and county, without prejudice to any other and further right, making any and all deductions for any loss, charge or expense sustained to which it would be entitled under the contract, specifications and or bond for faithful performance, or otherwise, before paying over the balance of any sum or sums retained as aforesaid, if any, to the contractor,"

that at the time of the service of the garnishment summons upon the city and county the work under the contract had

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been completed and there was a balance due to Reade under such contract of \$397; that, acting upon the recommendation of the building inspector and an affidavit by Reade, that he had "paid all the bills for materials furnished and labor executed for the additions to the new Nuuanu electric light plant in Nuuanu Valley or had made satisfactory arrangements to pay the same" said sum of \$397, being the balance due under the contract, was allowed and ordered paid by the board of supervisors; that, acting upon such order and authorization of the board of supervisors, the auditor of the city and county drew a warrant in favor of said Reade for said sum of \$397, but that sundry claims having been brought to the attention of the auditor and the city and county attorney for labor and materials still due and owing from the said H. B. Reade on account of said contract additions, the said auditor, on the advice of the city and county attorney, did retain and does still retain in his possession the said warrant for the sum of \$397.

By reason of the above facts it is preliminarily contended by the garnishee-appellant that at the time of the service upon it of the garnishment summons there was no debt actually owing by it to the principal defendant which might have been made the subject of an action for debt by the principal defendant (citing *Jefferson Bank v. Nathan* (Ala.), 35 So. 355; *Lorenson v. Rusk*, 67 Ill. App. 532), and that therefore there was no debt subject to garnishment. We think there is no merit in this contention. There is no showing made by the disclosure of any *loss, charge or expense* to which the city and county may be subjected by reason of any outstanding claim or claims against the contractor, nor is it alleged that no satisfactory arrangement has been made by the contractor to pay said claims. There is therefore nothing in paragraph 36 of the specifications, above quoted, which would authorize the withholding by the auditor of the amount found due and allowed by the

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board of supervisors (see *Territory v. Pacific Coast Casualty Co.*, 22 Haw. 446). Unless the auditor, who is the executive officer of the board of supervisors, is able to show that the order on him was fraudulent, or that a mistake existed in the amount found to be due, he could not go behind the judgment of the board of supervisors, acting in behalf of the city and county, directing the payment of this sum. There is no pretense of fraud or dispute as to the amount found to be due (*Shannon v. Reynolds* (Ga.), 3 S. E. 653). Before the delivery of the warrant to Reade it was undoubtedly competent for the board of supervisors to reconsider their action in allowing Reade's accounts and to direct the warrant to be cancelled. Even then Reade would have had his remedy upon his original claim against the city and county (*Merrell v. Campbell, County Clerk, Garnishee*, 49 Wis. 535). We are of the opinion that in the absence of any showing of an order by the board of supervisors directing the auditor to withhold the warrant, and in the absence of any showing of fraud, or dispute as to the amount found by the board to be due, that the auditor was without authority to withhold the warrant and that the principal defendant might have maintained an action against the city and county for the balance due him under his contract. It is a general principle that one who may be sued may be garnisheed by the creditor of the person who may sue (*Waterbury v. Com'rs Deer Lodge Co.*, 10 Mont. 515, 520; *Newark v. Funk*, 15 Ohio St. 462).

The principal ground relied on by the appellant, however, is that it, as a municipal corporation, is not subject to the process of garnishment. In support of this contention counsel for appellant cites many authorities, including *Merwin v. City of Chicago*, 45 Ill. 133, holding that for reasons of public policy municipal corporations are not liable to garnishment. Upon this point there is a mass of conflicting authority (5 McQuillin, Mun. Corp., Sec. 2517; Rood on Garnishment,

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Sec. 18), the reasons given by the courts for and against exempting municipal corporations from the garnishment process being set out with admirable conciseness in Rood on Garnishment, Secs. 21, 22. The whole question must, of course, ultimately depend upon statutory construction. This being true, and the question being one of first impression in this court, we adopt the language of Judge Welch in *City of Newark v. Funk*, 15 Ohio St. 463: "In other states authorities are quite conflicting; so much so, that we do not feel bound by any of them, and see nothing to prevent us from deciding the question as an original one, according to our own views of public policy and of the meaning and intent of the statute." By Act 118, Laws 1907, Ch. 111 R. L., the city and county of Honolulu is created a municipal corporation. It may sue and be sued in all courts and places and in all matters and proceedings. And by section 1636 R. L. 1915 (L. 1907, Act 118, Sec. 5) it is provided: "Suits, actions and proceedings may likewise be brought against said city and county, at law or in equity, for the recovery of any money, property or thing belonging to any person, corporation or the Territory, or for the enforcement of any rights of, or contracts with, or damages against, said city and county * * *." Section 2801 R. L. 1915 provides how any person indebted or having in his hands effects of a debtor may be summoned as garnishee. That the words "any person," used in that section, include corporations is too well settled to require discussion. Section 16 R. L. 1915 provides that the word "person" may signify not only persons or corporations, societies, communities and assemblies, inhabitants of a district or neighborhood, or persons known or unknown, but the public generally. The language of our garnishment statute is broad enough to cover all corporations, and all, it would seem, would be held to be within its terms unless there should be some rule or public policy which would exclude municipal corporations. In *Ports-*

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mouth Gas Co. v. Sanford, 97 Va. 124, 33 S. E. 516, 45 L. R. A. 246, 75 Am. St. Rep. 778, the word "person" in the garnishment statute was held to include municipal corporations. And in *Waterbury v. Com'rs. Deer Lodge Co.*, *supra*, a county was held subject to garnishment for a debt due by it to one of its officers under a statute making "all persons" liable as garnishees. Other cases holding municipal corporations liable to garnishment are *Laredo v. Nalle*, 65 Tex. 359 (referred to and approved as sound in 157 S. W. 208); *Bray v. Wallingford*, 20 Conn. 416; *Wilson v. Lewis*, 10 R. I. 285; *Wales v. Muscatine*, 4 Iowa 302; *State v. Horton*, 38 N. J. L. 88; *Rodman v. Musselman*, 12 Bush (Ky.) 354; *Mitchell v. Miller*, 95 Minn. 62; *Whidden v. Drake*, 5 N. H. 13; *Adams v. Tyler*, 121 Mass. 380; *Newark v. Funk*, *supra*. To the effect that the word "person" in a statute may include municipal corporations see *Met. R. R. Co. v. District of Columbia*, 132 U. S. 1, 10; *Olathe v. Mo. etc. R. R. Co.*, 96 Pac. (Kans.) 42; *Lancaster Co. v. Trimble*, 34 Neb. 752, 756; *Springfield v. Walker*, 42 Ohio St. 543, 547; *Harris v. Stearns*, 17 S. D. 439, 442.

Holding as we do that municipal corporations are within the letter of our garnishment statute (Sec. 2801 R. L. 1915) making "any person" liable as garnishee, we can perceive no sound reason for holding that public policy demands the exemption of such corporations from garnishment. The danger of varying the terms of a statute upon the ground of supposed public policy is pointed out in an able dissenting opinion by Chief Justice Dixon in *Buffham v. City of Racine*, 26 Wis. 449, 451, in which case the majority of the court held that a municipal corporation, upon grounds of public policy, is not subject to garnishment. We concur with the views expressed by the learned chief justice and in his reasoning that the statute, being a remedial one, should be liberally construed in favor of the remedy, and the corporation held liable. By chapter 158 R. L. 1915

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express authority is given to subject the wages and salaries of officers and employees of a municipal corporation to garnishment. If it be the policy of the Territory, as shown from this act, to make a municipal corporation liable to garnishment upon the debts due its officers and employees, there would seem to be no good reason for holding, in the absence of legislative expression, that it would not be liable to such a proceeding where it owes an ordinary debt to a third person (*Portsmouth Gas Co. v. Sanford, supra; Mitchell v. Miller, supra*). By section 2781 R. L. 1915 it is expressly provided that no writ of attachment shall be issued against the Territory or any political or municipal corporation or subdivision thereof, but no such inhibition appears with respect to the issuance of the garnishment writ against municipal corporations.

Again, in the case at bar it appears from the garnishee's written disclosure that the work under the contract has been completed, and accepted by the city and county, and that nothing remains to be done except to pay over to the defendant, or his creditor under garnishment proceedings, the balance found to be due said defendant and allowed by the board of supervisors. In *Laredo v. Nalle, supra*, it is held: "Public policy may demand that a sum set apart for erecting a public building should not be taken during the progress of its construction, for the debt of the person contracting to do the work, for that might prevent its completion; but when the work is finished and the money has been earned, and is standing to the credit of the contractor with the city, it should be subject, like any other property, to the payment of his debts." See also *Pringle v. Guild*, 118 Fed. 655; *Dillon, Mun. Corp., Sec. 101*.

We are of the opinion that the city and county of Honolulu was liable to garnishment and that the judgment appealed from should be affirmed, and it is so ordered.

Syllabus.

C. S. Davis and H. L. Grace for plaintiff.

A. M. Cristy, First Deputy City and County Attorney
(*A. M. Brown*, City and County Attorney, with him on the
brief), for the garnishee.

ARTHUR A. WILDER v. LUCIUS E. PINKHAM,
GOVERNOR OF THE TERRITORY OF HAWAII;
J. H. FISHER, AUDITOR; CHARLES J. McCAR-
THY, TREASURER, AND CHARLES R. FORBES.

No. 985.

MOTION TO DISMISS.

ARGUED JANUARY 25, 1917.

DECIDED FEBRUARY 1, 1917.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE WHITNEY,
IN PLACE OF COKE, J., DISQUALIFIED.

APPEAL AND ERROR—*appeal from equity decree.*

The proceeding in the supreme court upon an appeal from a
decision of a circuit judge sitting in equity is not a hearing *de*
novo, but a review of the decree and of the issues determined
thereby.

ABATEMENT AND REVIVAL—*suit by taxpayer—death of appellee.*

A suit by a resident taxpayer to restrain the illegal expenditure
of public money will not be dismissed because of the death of the
complainant after a decree has been entered in his favor and after
the time for the filing of his brief in the supreme court on an
appeal by the respondents has expired but the appeal will be
decided *nunc pro tunc* as of a day prior to the death of the appellee.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a motion by the respondents-appellants to dis-

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miss the suit which is now pending in this court upon appeal from a decree of a circuit judge because of the death of the appellee and on the ground that the cause of action has not survived to another. The suit was instituted by the complainant as a resident taxpayer to obtain an injunction against the approval and allowance of an alleged illegal claim against the Territory of the respondent Forbes and its payment out of public funds. A permanent injunction does not appear to have been issued, but the final decree itself orders the respective parties to refrain from approving, allowing, paying and collecting the claim. No point in this connection has been raised by the movants. The argument of counsel for the movants proceeds upon the contention that the appeal to this court involves a hearing of the case *de novo* upon the original cause of action. This, we think, is not the correct view. An appeal from the final decree of a circuit judge sitting in equity brings up to this court the entire case, including issues of fact, but, the hearing is had upon the record, unless newly discovered evidence be admitted, and the function of this court is to review the decree appealed from and to reverse, modify or affirm it, or to remand the cause to the circuit judge for a new hearing. R. L. 1915, Sec. 2509. The taking of the appeal did not vacate the decree. The statute relating to the abatement of actions (R. L. 1915, Ch. 145), assuming that it applies to suits in equity, does not cover the case of the death of a party pending an appeal in this court. The usual method of reviving a suit in equity is by bill of revivor. And it is held that where an injunction has been issued it does not become inoperative because of the abatement of the suit upon the death of the complainant, but that an order may be made requiring the complainant's representatives to revive within a stated time or that the injunction will be dissolved. *Hawley v. Bennett*, 4 Paige 163. But in the case at bar the suit had gone to final decree in the complainant's lifetime.

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It is urged that a taxpayer's suit such as this involves the assertion of a mere personal right which ends absolutely with the death of the complainant. We are unable to sustain the contention. The theory upon which a suit by a taxpayer to restrain the illegal expenditure of public money may be maintained is that of protection to the property rights of the complainant. *Castle v. Secretary*, 16 Haw. 769, 776; *Crampton v. Zabriskie*, 101 U. S. 601; 5 Pom. Eq. Jur. Secs. 344, 345. The complainant must show some damage (*McCandless v. Pratt*, 211 U. S. 437), but it is enough that the circumstances are such that damage to all taxpayers may be presumed. *Lucas v. Haw. E. & C. Co.*, 16 Haw. 80, 86. Upon this view of the matter, it would probably have to be held that upon the death of a complainant before decree those persons who succeeded to his property interests would have the right to revive the suit. *Gurley v. New Orleans*, 124 La. 390. In the case of *Gordon v. Strong*, 158 N. Y. 407, where the plaintiff in a taxpayer's suit, who was also the appellant, died pending an appeal, an order of revival was made in favor of the plaintiff's executors. There the statute provided that "for wrongs done to the property, rights or interests of another" except actions for injuries to the person "an action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrongdoer, in the same manner and with like effect, in all respects, as actions founded upon contracts." But in disposing of this motion we think we ought not to examine into the merits of the case to ascertain whether there is merit in the contention of counsel that the complainant in this case failed to show that any pecuniary interest of his was affected. It is enough for the present that the complainant obtained a favorable decree and that the burden is upon the appellants to show upon a consideration of the merits of the case that it was erroneous.

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The appeal was docketed in this court on November 18, 1916. The appellants filed their opening briefs on December 2. The time for the filing of the appellee's brief expired, under the rule of court, on December 12. The appellee died on January 4, 1917, without having filed a brief. He was not obliged to file a brief in this court, but could rest upon the presumption that the decree of the circuit judge was right. Under the circumstances, therefore, the appeal could have been argued and submitted without an appearance by or on behalf of the appellee at any time after the 12th of December. As a general rule the death of a party after an appeal has been submitted and taken under advisement does not affect the status of the appeal, for the court, upon being advised of the death of the party, may decide the appeal *nunc pro tunc* as of a day prior to his death. *Bell v. Bell*, 181 U. S. 175; *Danforth v. Danforth*, 111 Ill. 236; *Powe v. McLeod*, 76 Ala. 418. We think that this rule, under the circumstances of this case, may appropriately be applied here. The case has not been argued but the arguments of appellants may be presented now as they might have been in the absence of the appellee during his lifetime. Should the decision of this court upon the merits of the case result in the reversal of the decree and require further proceedings in the court below the respondents may take such steps to secure the revival of the suit or its dismissal as they may be advised. Should the decree be affirmed it will, of course, remain in effect.

The motion is denied.

Arthur G. Smith and *A. Perry* for the motion.

Syllabus.

IN THE MATTER OF THE ESTATE OF BERNICE
PAUAHI BISHOP, DECEASED.

No. 972.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JANUARY 24, 1917.

DECIDED FEBRUARY 1, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

JUDGES—*disqualification—pecuniary benefit.*

Where a majority of the justices of the supreme court acting under a power of appointment contained in a will, the justices receiving no reward or pecuniary benefit, fill a vacancy among the trustees under such will, they are not thereby disqualified from sitting in a case on appeal involving the validity of the appointment.

WILLS—*construction—appointment of trustees.*

The will of B named five trustees to execute a certain trust therein created, provided that the number of trustees should be kept at five, and provided that vacancies among the trustees should be "filled by the choice of a majority of the justices of the supreme court;" at the time the will took effect the justices, severally, exercised original jurisdiction in equity subject to appeal to the supreme court in banco; later all original jurisdiction in equity was transferred to circuit judges sitting at chambers in equity. Held, in construing the will, that it was the intention of the testatrix to vest the power of filling vacancies in the justices, as individuals, and not in the court which should exercise original jurisdiction in matters of the trust, and, consequently, that the transfer of sole original jurisdiction to circuit judges at chambers in equity did not transfer from the justices of the supreme court to the circuit judge the power of filling vacancies among the trustees under the will.

SAME—*same—words and phrases.*

Where an instrument creating a trust named trustees, fixed the number of trustees and provided that vacancies among the

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trustees "should be filled by the choice of the majority of the justices of the supreme court," the word "choice" therein is synonymous with and means "appoint," and an appointment so made is not subject to confirmation or rejection by the circuit judge exercising original jurisdiction in matters relating to the trust.

TRUSTS—appointment of trustee—judicial function.

While a grantor of a trust cannot delegate a judicial function to any court, such function being created by law, the naked power of appointing in succession the trustees of a trust is not a judicial function but a power which may be delegated by the grantor.

OPINION OF THE COURT BY QUARLES, J.

In the will of Bernice P. Bishop, after making a number of devises and bequests, the testatrix devised the residue of her estate to five trustees therein appointed, to be held and used by them in the erection and maintenance in the Hawaiian Islands of two schools, one for boys and one for girls, to be called the Kamehameha Schools, a portion of the income for each year to be devoted to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiians of pure and part aboriginal blood. The estate is very large and of great value. Considerable discretion is left to the trustees in the execution of the trust and the furtherance of its objects. The testatrix named as such trustees her husband, Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke and William O. Smith, and under the paragraph naming them (14) are found the following provisions: "I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the justices of the supreme court, the selection to be made from persons of the

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protestant religion." This will was executed in 1883, the year before the testatrix died, and the will was admitted to probate December 2, 1884. Vacancies have occurred from time to time and have been filled so that on the 9th day of June, 1916, of the five trustees, namely, Samuel M. Damon, William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, only the first two mentioned were appointed by the testatrix. On June 9, 1916, the written resignation of Samuel M. Damon as such trustee was presented to the first judge of the first judicial circuit, who at chambers exercises original jurisdiction in equity, and has original jurisdiction of the trust created by said will, and on the petition of all of said trustees was by order then made accepted, thereby leaving a vacancy caused by the said resignation of said Samuel M. Damon. On the same day the said vacancy was brought to the attention of the justices of this court by presenting said resignation, and all of the justices, exercising the power delegated to them in the said will, appointed William Williamson to succeed the said Samuel M. Damon as trustee under the provisions of said will. Thereupon and on the same day the trustees Smith, Bishop, Judd and Carter presented to the said circuit judge their petition setting forth the qualifications of said Williamson as such trustee and his said appointment by the justices of this court and prayed that his appointment as aforesaid be confirmed by said circuit judge. A hearing on the said petition was immediately had when certain evidence touching the qualifications and fitness of the said William Williamson as such trustee was introduced before the said circuit judge. Thereafter, and on the 29th day of July, 1916, the said circuit judge in a document styled "Opinion and Decision" decided that the appointment of the said Williamson as aforesaid was without authority, null and void; made an order assuming to appoint Charles E. King as trustee to fill the said vacancy, and fixed his bond at \$20,000 if given

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separately, but providing, however, that a new joint bond on behalf of all of the trustees, including the said King, might be given in the sum of \$100,000. Thereafter, and on August 3, 1916, a decree was filed, signed by the said circuit judge, adjudging the appointment of William Williamson as such trustee by the justices of this court to be null and void; appointing the said Charles E. King as a trustee under the said will in succession to Samuel M. Damon resigned, and providing for the execution in the alternative of one of the bonds beforementioned. From the said decree of the circuit judge the trustees have appealed to this court.

A written suggestion of the disqualifications of the justices of this court who made the said appointment of William Williamson as such trustee was filed in this court on the 2d day of December, 1916, wherein it is suggested that the said justices "have a pecuniary interest, direct or indirect, in this cause." The power of appointment delegated to a majority of the justices of this court in and by the said provision of the will aforesaid is a naked power without reward or pecuniary benefit to the justices or any of them. For this reason the suggestion as to the disqualification of the justices appointing the said William Williamson to fill the said vacancy was denied; and it was held, and is held, that the said justices are not disqualified from presiding at the hearing and determination of this appeal.

The ground upon which the learned circuit judge based his decision that the appointment of William Williamson by the justices of this court was without authority and void is that at the time of the death of the testatrix and prior thereto the supreme court of Hawaii and the justices thereof exercised original jurisdiction in equity, and by the rules of law and equity the court and the justices thereof were vested with the power to fill vacancies in the matter of trustees generally; that it was the intent of the testatrix to vest such power in the court and not in the individuals

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who might from time to time "chance to fill the offices of a majority of the justices of the supreme court," and this view has been ably and learnedly insisted upon by counsel for Charles E. King. The fitness of the trustee appointed is not a matter for the circuit judge to determine, but the power and responsibility of so doing are vested by the testatrix in the justices of this court, a majority of whom must exercise such duty. It is not contended that the testatrix did not have the power of appointing the original trustees, or that she did not have the power, for the purpose of perpetuating the trust and carrying out the objects and purposes thereof, of providing in her will the mode and manner of filling vacancies among the trustees under the will, or that she did not have the power of prescribing what individuals, body or tribunal should exercise such power, the contention being that she intended that the judicial tribunal exercising control over the matters of the trust should exercise the power of filling vacancies, and that when, by the judiciary act of 1892, exclusive original jurisdiction in equity was vested in circuit judges sitting at chambers, the said power passed from the supreme court and justices thereof to the circuit judges and can only be exercised, under a proper construction of paragraph 14 of said will, by the circuit judge who, presiding at chambers in equity, has jurisdiction in equity. To support this contention cases in which it is claimed that the justices of the supreme court sitting in banco exercised original jurisdiction are cited as follows: *Tucker v. Est. of Metcalf*, 3 Haw. 180; *Davis v. Brewer*, 3 Haw. 359; *Wei See v. Young Sheong*, 3 Haw. 489; *In the Matter of the Estate of His Late Majesty Lunalilo*, 3 Haw. 519; *Unauna v. Armstrong*, 3 Haw. 705; *Kalakaua v. Keaweamahi*, 4 Haw. 577, and *Kalaeokekoi v. Kahele*, 4 Haw. 668.

In *Tucker v. Est. of Metcalf*, Chief Justice Allen, as chancellor, and Hartwell, Justice, sat in an equity case and made

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an order referring the cause to a master to state an account in the matter of the dissolution of a partnership "with the agreement that Hartwell, J., should sit with the chancellor, and their decision be final." In *Davis v. Brewer*, *Wei See v. Young Sheong* (see concurring opinion of Hartwell, J.), *In the Matter of the Estate of His Late Majesty Lunalilo*, *Unauna v. Armstrong*, and *Kalaeokekoi v. Kahele*, the hearings in the supreme court were upon appeal, as a careful inspection of the decisions will show, except in the case last mentioned, but the record in this court shows that in that case a demurrer was heard by Judd, C. J., as chancellor, and sustained by him March 23, 1883, an appeal being taken from his decision on March 24, 1883. The decision upon this appeal, which is reported in 4 Haw. 668, was filed April 11, 1883. By constitutional and statutory provisions prior to the judiciary act of 1892 original jurisdiction in equity was vested in the supreme court and circuit courts. Such jurisdiction was exercised by the chief justice as chancellor, the first associate justice as vice-chancellor, and, subsequent to 1862, by the second associate justice, acting severally and not jointly, and from the decision of the chancellor, vice-chancellor or second associate justice an appeal lay to the supreme court in banco (Constitution 1852, Art. 86; Constitution 1864, Art. 68; Compiled Laws 1884, Secs. 847, 848). After the act of 1878 (see Compiled Laws 1884, p. 389), and prior to the judiciary act of 1892, the several justices of the supreme court sitting at chambers, and the several circuit judges, exercised original equity jurisdiction. A careful examination of the decisions shows that it was the rule by constitution, statute and practice for a single justice to sit in equity matters, his decision being subject to appeal to the supreme court in banco. To this rule, custom or practice there appears to have been only two exceptions, those in the cases of *Tucker v. Est. of Metcalf*, and *Kalakaua v. Keaweamahi*, where, by agreement,

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the first named cause was submitted to the chancellor and Hartwell, J., and in the latter cause a demurrer was heard in the first instance by the full court, by consent, for the purpose of expediting the decree in the cause and making the decision on the demurrer final, analogous to reserving a question. The very fact that in these two last cases named the submission to more than one justice was by consent tends to show the departure made in these cases from the usual practice in equity matters wherein original jurisdiction in equity was exercised by a single justice sitting in equity at chambers. This practice obtained at the time the will of the testatrix was written, had obtained for many years prior thereto, and was in force at the time the will was probated and took effect; hence the provision of the will under consideration must be construed as being intended to vest and as vesting in the justices of this court as individuals, and not as a court, the power of filling vacancies among the trustees. If the authority to fill such vacancies had been delegated to the police magistrate of Honolulu, it would be evident that it was not in the mind of the testatrix that the particular judge or court exercising equity jurisdiction in other matters touching the trust should also have power to fill vacancies in the office of trustee under the will. Inasmuch as the justices of the supreme court at the time the will became effective did not act jointly or as a court in banco in exercising original jurisdiction, but acted severally, it would be extending the terms of the provision of the will under consideration to hold that the testatrix intended by the language used that when a trustee under the will dies or resigns the vacancy thereby occasioned should be filled by appointment made by the particular court exercising original equity jurisdiction in other matters pertaining to the trust. It is true that the testatrix in the will could not delegate a judicial function to any court; that such functions are created by law and not

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by appointment of individuals. But the naked power of appointing in succession the trustees of the trust is not of itself a judicial function but a power which may be created by the grantor of a trust. If the testatrix had named the chancellor as the person to fill vacancies it might well be contended that she intended that the court exercising original equity jurisdiction should fill vacancies among the trustees under her will, and, consequently, that when the chief justice ceased to be chancellor and the powers of the chancellor were transferred to the circuit judge sitting at chambers in equity, that it was her intention that the latter should thereafter exercise such power of appointment. We think the conclusion is reasonable that the testatrix in naming a majority of the justices of this court intended that the individuals occupying the offices of chief justice and associate justices, or a majority of them, acting as individuals, should exercise the power of appointment, and not the supreme court, and that the language used is merely descriptive of the persons whom she intended should exercise the power. This conclusion is the more reasonable one when we reflect that the testatrix must have known of the changes which occur from time to time in the personnel of the justices of this court.

Construing the provision in the will of the testatrix touching the filling of vacancies among the trustees under the will as we do makes it unnecessary to review the many authorities to which we have been cited to the effect that when the judge of a certain court charged with the sole exercise of original jurisdiction of a particular subject, for instance, equity or probate, is vested with the power of filling vacancies among the trustees of a trust by the instrument creating the trust, that the grantor intended to vest the *court* with such power and not the *judge as an individual* who presides over such court, such authorities not being in point here. The delay and confusion that have

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arisen in the matter before us are largely due to the improper action of the trustees under the will of the testatrix in petitioning the first circuit judge, sitting at chambers in equity, to confirm the appointment of William Williamson as trustee. The will does not provide that the choice or appointment made by the justices of this court should be subject to the approval or consent of any other officer or tribunal. The power of approval implies the power or right of disapproval—the power of vetoing the act of the justices of this court in exercising the power of appointment—and such veto power, if exercised as attempted by the learned circuit judge, would necessarily result in defeating the intent of the testatrix as expressed in the provisions of her will under consideration. The only proper petition to the circuit judge would be one asking that he name the amount of the bond to be given by the appointee and approve the same when given.

The learned circuit judge took the view that the word “choice” in the provision of the will of the testatrix under consideration is synonymous with and means “nominate,” and does not mean “appoint,” and he therefore concludes that the power of approving or rejecting a “nomination” made by the justices or a majority of the justices of this court rests with him. With this view counsel for Charles E. King does not concur, as in the argument on the appeal he expressed the view that the word “choice” is synonymous with and means “appoint,” and with such view we fully agree.

The decree appealed from is reversed and the cause is remanded to the circuit judge sitting at chambers in equity with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to Samuel M. Damon resigned; and for such further proceedings as are consistent with the views herein expressed.

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P. R. Bartlett (Holmes & Olson with him on the brief)
for the trustees.

E. C. Peters for Charles E. King.

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MRS. GEORGE KAISER *v.* SAMUEL K. PUA AND
THE VOLCANO STABLES & TRANSPORTATION
COMPANY, LIMITED.

No. 949.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

SUBMITTED JANUARY 20, 1917.

DECIDED FEBRUARY 9, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

EXEMPTIONS—truckman.

Plaintiff, a married woman, owned an auto-truck with which she did the business of a truckman on her own separate account; she did not drive the truck but her husband drove it for her, and by its use she actually earned a living: Held, that plaintiff is a truckman within the meaning of section 2470 R. L., and that the truck is exempt from attachment or execution.

SAME—claim of exemptions.

It is not necessary for an attachment or execution defendant to make a claim of exemption as to property specifically exempt from seizure and sale under attachment and other process where the exemption statutes do not provide for the making of such claim but do make the officer seizing the same liable to an action for damages for such seizure.

HUSBAND AND WIFE—statutory construction—exemptions.

Section 2959 R. L. does not amend or repeal any of the provisions in the statutes exempting specific personal property from seizure under attachment or execution, and where the certificate

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therein provided has not been filed with the treasurer, property of the wife, engaged in business on her own account, which is specifically exempt from seizure under attachment or execution, is not subject to attachment for the debt of her husband.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff, a married woman, owned a motor truck with which she did the business of teamster or truckman. She did not drive the truck herself, but her husband drove it for her and attended to the business, collecting the earnings which were deposited in bank to the credit of the plaintiff and by her checked out. She had no other business, and by the use of the truck actually earned a living for herself and family. The defendant, The Volcano Stables & Transportation Company, Limited, sued the husband of the plaintiff for debt and caused a writ of attachment to be issued, whereupon the defendant Pua, as sheriff, seized the truck under the attachment and held it prior to judgment, and thereafter for sometime held it under an execution which issued on the judgment. Soon after the seizure the plaintiff, acting by her attorney, notified the defendants that the truck was the property of the plaintiff, was exempt from execution, and demanded its release. The present action was brought by the plaintiff against the defendants to recover damages for the seizure and detention of the truck. At the close of the evidence on behalf of the plaintiff, which evidence tended to establish the foregoing facts and the value of the use of the truck during the time of its detention by the defendants, counsel for the defendants moved for an instruction to the jury to find for the defendants upon three grounds, (1) that the evidence did not show that the plaintiff was entitled to recover, (2) that the plaintiff was doing business separately at the time of the attachment of the truck and had not filed a certificate with the treasurer as required by the provisions of section 2959

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R. L., and (3) that the plaintiff had not shown herself entitled to any exemption as provided by section 2470 R. L. The trial court sustained the motion and directed the jury to find for the defendants, whereupon a verdict was found in favor of the defendants. The plaintiff excepted to the instruction to find for the defendants and to the verdict.

Section 2465 R. L. provides that "Where an officer shall be about to levy an attachment, execution or other process on personal property, some of which shall be claimed as exempt, he shall demand of the defendant in writing that he make selection of such property as is exempt to him and in reference to which he has the right of selection; or, failing so to do, the officer shall make it for him, and any selection so made shall be conclusive on the defendant." Section 2470 R. L. exempts from attachment and execution one dray, truck or automobile, by the use of which a cartman, drayman or truckman actually earns his living. Section 2467 provides that if any officer shall seize or sell property exempt from execution under section 2470 "he shall be liable to an action at the suit of the owner for all damages and costs sustained thereby." It is claimed on behalf of the defendants that because the plaintiff did not drive the truck in question, but the same was driven by her husband, she is not a truckman within the meaning of the statute. The truck was used in hauling freight from place to place for hire and by such means the plaintiff actually earned a living for herself and family. The inability of the plaintiff to drive the truck herself did not prevent her from being a truckman within the contemplation of the statute, she having no other business or occupation. She might well carry on the business of trucking by the hands of another when by so doing she actually earns her living. She is not to be denied the benefit of the exemption simply for the reason that on account of her sex or for other cause she can-

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not drive the truck herself. The object and purpose of exempting from attachment and execution specific articles by which one in an occupation actually earns a living applies to the case before us and the plaintiff is within the intent and spirit of the statute. That it is not necessary that she drive the truck in person in order to receive the benefits of the statute, see 11 R. C. L. 501; *Brusie v. Griffith*, 34 Cal. 302; *Elder v. Williams*, 16 Nev. 416; *Consolidated Tank Line Co. v. Hunt* (Ia.), 12 L. R. A. 476; 2 Freeman on Executions, 3 ed., Sec. 224.

It is contended on behalf of the defendants that as the plaintiff was doing business on her own behalf, and the certificate required by section 2959 R. L. had not been filed with the treasurer, that the said truck was by the terms of that statute subject to attachment and execution for the debts of her husband. In applying these several statutes to the case at bar we must consider section 2959 and construe it with reference to the other statutes mentioned, and, doing so, we hold that the language "If such certificate be not filed as aforesaid, the personal property employed in such business shall be liable to be attached as the property of the husband, and to be taken on execution against him," found in said section 2959, has no application to personal property of the wife which is otherwise exempt from execution, although she is doing business in her own right and the certificate has not been filed. The legislature did not intend by the enactment of section 2959 to amend or repeal any provision of the exemption statutes.

It is urged on behalf of the defendants that the motion for a directed verdict was properly granted for the reason that the execution defendant—the husband of the plaintiff—made no claim of exemption of the truck and that the claim of exemption made by the plaintiff cannot avail, she being a third party to the attachment proceedings. We hold that no claim of exemption either by the plaintiff or her

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husband was necessary, the truck being specifically exempt from execution and the sheriff being made liable by statute for its seizure. Statutory provisions in many jurisdictions require that a claim of exemption shall be made by the execution defendant and that if he fails to make such claim he waives the exemption. We have no such statutory requirement. Under our statutes, where the execution defendant has more than the statute exempts of a certain class of personal property, two trucks, for instance, it is the duty of the sheriff to take the initial step by notifying the defendant to make his selection and if the defendant fails to make such selection then it is the duty of the sheriff to make it for him. The language of the statutes cited, when considered together, rather negatives the idea that specific exemptions must be claimed by the execution defendant. It would seem an anomaly to hold that if the truck belonged to the husband of the plaintiff it would be exempt under the said attachment and execution, and that, having failed to file the certificate required by section 2959, it is subject to execution against the husband of plaintiff *as his property*, and we are unable to come to such conclusion. The notice and claim of exemption given by plaintiff, although not required by the statutes, were proper under the circumstances as they brought home to the defendants the ownership and claim of exemption on the part of the plaintiff. The trial court erred in directing a verdict for the defendants.

The exceptions are sustained and the cause remanded for a new trial. The costs in this court are awarded to the plaintiff.

J. W. Russell and Harry Irwin for plaintiff.

Carlsmith & Rolph for defendants.

Syllabus.

JOSEPH S. FERRY v. CARL S. CARLSMITH.

No. 955.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

ARGUED JANUARY 23, 1917.

DECIDED FEBRUARY 9, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

LIBEL AND SLANDER—*privileged communication.*

An attorney in the conduct of judicial proceedings is privileged from prosecution for libel or slander in respect to words or writings used in the course of such proceedings reflecting injuriously upon others when such words or writings are material and pertinent to the questions involved regardless of the motive prompting the use of the words or writings, but counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions against a party, witness or third person which have no relation to the subject-matter of the inquiry.

EVIDENCE—*burden of.*

Where plaintiff has made out a *prima facie* case the burden of evidence shifts to defendant and a nonsuit should not be granted.

DISMISSAL AND NONSUIT—*motion for—effect of on evidence.*

A motion for a judgment of nonsuit admits everything the evidence fairly tends to prove.

OPINION OF THE COURT BY COKE, J.

(Robertson, C.J., dissenting.)

This is an action based upon alleged false and defamatory words spoken maliciously of and concerning plaintiff herein in the course of defendant's address, as an attorney, to a jury impaneled to try the case of John Mitsuhashi against Joseph Ferry, plaintiff herein, then pending in and before the fourth circuit court. The latter case was an

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action for damages for alleged malicious prosecution of said Mitsuhashi by Ferry. In that case Carlsmith, the defendant herein, was the attorney for Mitsuhashi.

The plaintiff's second amended complaint, upon which the case finally went to trial, set forth the alleged slanderous words of the defendant Carlsmith, included in which is the following: "He (meaning the plaintiff herein) attempted to blackmail John Mitsuhashi, meaning and intending thereby to charge that plaintiff herein had feloniously attempted to extort money from said John Mitsuhashi; that shyster Ferry (meaning the plaintiff herein) was trying to do up this old man. He (meaning the plaintiff herein) was after scheme money, meaning and intending thereby to charge that the plaintiff herein was a tricky lawyer and was doing his business as such lawyer in a dishonest way and without professional honor. The defendant (meaning the plaintiff herein) wanted the plaintiff (meaning Mitsuhashi) to pay him \$200, for what? The defendant Ferry (meaning the plaintiff herein) was after hush money; he was after blood money, meaning and intending thereby to charge that the plaintiff herein was feloniously attempting to extort the sum of \$200 from said Mitsuhashi. * * * All of which said words were false and defamatory and were not pertinent or material to the issue in said action or to the matters then under discussion or inquiry."

The plaintiff produced a considerable amount of evidence in support of the allegations of his complaint and rested his case, whereupon the defendant moved for a judgment of nonsuit upon various grounds, but which, for the purpose of this opinion, may be confined to the following: (1) That the plaintiff had failed to show that the defamatory words spoken by defendant, as set forth in plaintiff's amended declaration, were not pertinent, relative and material and did not have reference to the matters and issues

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in the case of Mitsuhashi against Ferry; (2) that the plaintiff had, by the evidence introduced in his behalf, affirmatively shown and proven that the said defamatory words were spoken in relation to and in connection with the action and with reference to the matters in issue in the case of Mitsuhashi against Ferry, and (3) that the plaintiff had affirmatively shown and proven that the defamatory words were privileged." As a general proposition of law we hold it to be well settled that attorneys, in the conduct of judicial proceedings, are privileged from prosecution for libel or slander in respect to words or writings, used in the course of such proceedings, reflecting injuriously upon others, when such words and writings are material and pertinent to the question involved. Within this limit the protection is complete irrespective of the motive prompting the use of the words or writings, but the privilege does not extend to matters having no materiality or pertinency to the question involved in the suit. The communication is absolutely privileged if the same is a fair comment upon the evidence and relevant to the matters at issue. "Counsel is not liable to answer for defamatory matter uttered by him in the trial of a cause if the matter is applicable and pertinent to the subject of inquiry, but this privilege of counsel must be understood to have this limitation, that he shall not avail himself of his situation to gratify private malice by uttering slanderous expressions against party, witness, or third persons which have no relation to the subject-matter of the inquiry." Townshend, Slander & Libel, 3 ed. 392. 25 Cyc. 383.

This leads us to a consideration of the question whether the defendant Carlsmith, in his argument to the jury in the case of Mitsuhashi against Ferry, exceeded the limit to which he would be afforded protection by the rule just stated, or whether his language to the jury constituted a fair comment upon the evidence and was based upon mat-

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ters relevant to the issue. Upon whom rested the burden of proof of the negative allegation contained in the complaint, that is to say, "that the words spoken were not pertinent or material to the issue in said action or to the matters then under discussion or inquiry," has occupied much of the attention of counsel herein, both in their oral argument and in their briefs. We recognize that the authorities are badly divided upon this question.

Conceding for the purpose of this opinion, but not so deciding, that the burden of proving the negative allegation of the non-materiality of the words alleged to have been maliciously and slanderously spoken by defendant, to be upon the plaintiff, and in view of the fact that ample evidence was adduced on the part of the plaintiff in proof of malice and the other material allegations contained in plaintiff's complaint, there remains but one question for us to decide, namely, whether there was sufficient evidence introduced up to the time of the presentation of the motion for nonsuit to sustain the allegation of the non-materiality of the words spoken to the issues involved, thereby shifting the burden of the evidence from plaintiff to defendant. The burden of proof remains with the party upon which it is cast by the pleadings, but the burden of the evidence may shift back and forth with the ebb and flow of the testimony.

The plaintiff Ferry in his testimony before the jury in this case explained at great length and in detail the facts and circumstances surrounding his entire dealings with Mitsuhashi, and particularly with reference to the two hundred dollar transaction, in regard to which Carlsmith in his address to the jury is alleged to have made use of the words "hush money" and "blood money," thereby accusing Ferry of feloniously attempting to extort from Mitsuhashi the sum of two hundred dollars. The evidence sufficiently establishes the fact that the client of Ferry had endeavored to settle a pending suit with Mitsuhashi by the latter's

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payment of the sum of two hundred dollars to cover costs and expenses, and that the proposition of settling on such terms was, by direction of his client, presented by Ferry to Mitsuhashi. Ferry further testified that to the best of his recollection he had given the same evidence regarding these transactions in the trial of the malicious prosecution case of Mitsuhashi against Ferry. The evidence of Ferry (and there is no other evidence in the record pertaining to the subject) clearly shows that the dealings between himself and Mitsuhashi relative to the two hundred dollars were innocent of wrong and entirely free from any taint or just suspicion that Ferry was acting dishonestly in relation thereto. In the light of this evidence it was not a fair comment upon the evidence nor material to the issues involved in the case, in referring to this transaction, to accuse Ferry of attempting to obtain hush money or blood money from Mitsuhashi, unless there was other evidence in the case justifying the use of the language. It is neither relevant nor material to characterize an innocent transaction as an attempt to extort blood money. "Surely no one would contend that, when the facts show that a person had been caught passing counterfeit 50-cent pieces, it would be relevant to refer to the occurrence as the 'discovery of another Jack the Ripper.'" *Press Pub. Co. v. Gillette*, 229 Fed. 108. In view of the fullness of Ferry's testimony respecting this transaction we are of the opinion that the burden of producing such other evidence, if any existed, was shifted to the defendant. Counsel for the defendant took the position that it was incumbent upon the plaintiff to have presented in evidence a transcript of the entire evidence given at the trial of the malicious prosecution case in order to establish the non-materiality of the language claimed to have been used by defendant to the issues in the case. We think this course, although a cautious one, not necessary for reasons above set forth. If there was anything

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in such evidence that would rebut and overcome the *prima facie* case made by the plaintiff it was a matter available to the defendant. We hold that plaintiff had at the close of the evidence made out a *prima facie* case and was entitled to have the same passed upon by the jury, and that the trial court erred in granting the motion for nonsuit. "A motion for a judgment of nonsuit admits everything which the evidence fairly tends to prove." 2 Thompson on Trials, Secs. 2267-2268; 2 Chamberlayne on Evidence, Sec. 980; *Kelley v. Owens*, 30 Pac. 596.

The order granting the nonsuit herein is hereby reversed and the cause remanded to the lower court for a new trial.

Harry Irwin for plaintiff.

W. H. Smith (*Carlsmith & Rolph* with him on the brief) for defendant.

DISSENTING OPINION OF ROBERTSON, C.J.

It is assumed that the burden of proof was upon the plaintiff to show that the words uttered by the defendant were not pertinent or material in or to the case in the course of the trial of which they were spoken. In order to sustain this burden it was incumbent on the plaintiff to show that the language complained of was not permissible comment upon any of the evidence given in the former case viewed from any possible angle. See *Youmans v. Smith*, 153 N. Y. 214, 219. No such proof was offered in the case at bar. Counsel for the plaintiff took the position at the trial, as he has done in this court, that the burden was upon the defendant to show by way of defense that his remarks were pertinent and material to some issue in the former case, and he made no attempt to prove the negative. On cross-examination of the plaintiff testimony was elicited tending to show that the two hundred dollar proposition was a *bona fide* one made in connection with the settlement of a then pending action of ejectment in which Mit-

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suhashi was the defendant. If there was any evidence in this case that there was no testimony in the malicious prosecution case other than that given by Ferry I would concur with the majority that the language used by the defendant was not pertinent or material, but wholly unjustified. As the evidence stood when the plaintiff rested his case I think the trial judge was obliged to hold that the plaintiff had failed to make a *prima facie* showing that the language was not pertinent or material. He was unable to say, as this court is unable to say, that there was no evidence in the case which could have served as a basis for an accusation of blackmail. The case of *Press Pub. Co. v. Gillette*, 229 Fed. 108, was not one involving the privilege of a witness or counsel in a proceeding in court, and, it seems to me, throws no light on the question involved in the case at bar.

THE TRUSTEES OF THE HILO BOARDING SCHOOL,
A CORPORATION, v. THE TERRITORY OF
HAWAII.

No. 965.

APPEAL FROM WATER COMMISSIONER.

HON. C. F. PARSONS, COMMISSIONER.

ARGUED JANUARY 18, 1917.

DECIDED FEBRUARY 14, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

WATERS AND WATERCOURSES—*appeal and error—findings of water commissioner.*

On an appeal from the decision of a water commissioner, where the determination of a question of fact depended on conflicting

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testimony, the finding of the commissioner ought not to be disturbed if it is supported by substantial evidence and does not appear to be against the weight of the evidence, or inherently inequitable.

In this case the decision of the commissioner is affirmed upon the evidence.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a suit which was brought before the circuit judge of the fourth circuit, sitting as water commissioner, by The Trustees of the Hilo Boarding School, a corporation, against the Territory of Hawaii and over 30 others for the adjudication and determination of a certain disputed water right claimed by the petitioner. Only the Territory contested the case, and the matter is now before us on the Territory's appeal from the decision of the commissioner. The appellant complains of certain rulings as to the admission of evidence which we deem it unnecessary to discuss since, under the view we take of the case, the decision of the commissioner ought to be affirmed upon all the evidence which went in without objection. After argument was had on the appeal the members of this court, accompanied by counsel, viewed the *locus* and examined the several points on the ground to which argument had been directed and attention was called.

The water right in question is claimed by the petitioner as an appurtenance of the land of Punahoa, situate in Hilo, Island of Hawaii, which was awarded to the American Board of Commissioners for Foreign Missions in 1849 by Land Commission Award 387, Part 4, Sec. 1. And the petitioner claims as the owner of a portion of the land of Punahoa; as grantee of certain owners of other portions thereof; and by adverse user for over twenty years as against the owners of other portions of the land, being the non-contesting respondents in this case. The Territory concedes that a water right passed with the award of the land of Punahoa

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as appurtenant thereto, but claims that the decision of the commissioner was erroneous in that in determining the right he allowed a much greater quantity of water than the proofs authorized.

The south branch of the Wailuku river, from which the water in question is taken, has its origin and flows its entire length on the government land of Piihonua. At and above the point of diversion, at an elevation above sea level of from 1040 to 1060 feet, there is a peculiar formation of lava rock constituting a chain of huge boulders extending up the bed of the stream. These boulders have been connected by a series of dams, seven in number, which were put in for the purpose and have the effect of collecting and retaining the water of the stream, or a portion of it, according to the volume of the total flow which varies from day to day, and taking it out at a point on the south bank of the stream whence it flows for some distance through what appears to be a small gulch or natural waterway and thence over and across Piihonua on to Punahoa through what is admittedly an artificial ditch which eventually passes through the premises of the petitioner, in the town of Hilo, and may finally reach the sea. This is a very general description of the situation as it appears on the ground. There were two or three branches from the ditch in the town of Hilo, and the Territory contends that originally there was a branch immediately above the third Halai hill (Puuhonu) which carried a portion of the water over to the adjoining land of Ponahawai for the use of the occupants of that land, also that from a point at the base of the second Halai hill a branch took a portion of the water to the lower part of the land of Piihonua. These claims are disputed by the petitioner and there has been no water flowing in these branches for a long time. We think the facts need not be determined. The ultimate question which the commissioner had to decide was what quantity of water passed as appurtenant to

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Punahoa by the Land Commission Award of 1849. There was no direct evidence on this point. There is no reason to believe that the right as it existed or was exercised before or at the time of the issuance of the award of Punahoa was defined by any definite or maximum quantity or any specific proportion of the water flowing in the stream. So far as the evidence discloses, the original right was to divert and take from the stream as much water as could be diverted by the means used, namely, dams composed of loose rocks, turf and logs, and to take the same, less whatever, if any, belonged to Ponahawai or the lower part of Piihonua, to Punahoa. The quantity of water thus diverted necessarily varied from time to time as the flow in the stream was affected by the amount of rainfall above the place of diversion. The evidence tends to show that in a time of drouth practically all the water of the stream could be diverted into the ditch. The petitioner alleged and claimed that its right should now be defined by quantity and that the quantity was approximately ten million gallons of water each twenty-four hours. The commissioner held that the petitioner was entitled to divert from the stream five million five hundred and ninety thousand gallons a day. This, of course, fixed the maximum quantity which the petitioner would be entitled to divert in any one day since the quantity flowing in the stream might at times be less than that. The petitioner now contends that upon the evidence it was and is entitled to divert ten million gallons per day. But as it did not appeal from the decision of the commissioner this court would not be authorized to increase the amount fixed by the decision. The Territory contends that the amount fixed by the commissioner was at least one million gallons more than the evidence warranted. There was no evidence of any measurements having been made of the water flowing in the ditch or the stream until in recent years, and the evidence tending to throw light upon the quantity which flowed

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in the ditch in former years was very conflicting. The origin of the ditch is obscure, and rests in hearsay and tradition. On behalf of the petitioner some witnesses testified to having been informed that the ditch, with its branches, had been constructed by one Aki, who is said to have been kono-hiki of Punahoa, in 1813. Other witnesses for the petitioner testified that according to their information the ditch was made by Rev. Joseph Goodrich of the Sandwich Islands Mission in 1824. The theory of the Territory is that the ditch was built by I, a high chief of Hilo, who is said to have lived in the seventeenth century, there being evidence that the ditch was known to kamaainas as "I auwai." The construction of the ditch was a work of considerable magnitude and importance, and we incline to the belief that if it had been done at so recent a time as 1813 or 1824 the identity of the author of the project and the purpose for which it was instituted would be known with more certainty at this time. Be the fact as it may, the evidence tends to show that long prior to 1849 the water of the ditch was used not only for the domestic purposes of the inhabitants but for power purposes also. Commodore Wilkes (U. S. Exploring Expedition, Vol. IV., pp. 208, 209) spoke of a small sugar mill owned by Governor Adams which was "worked by a small stream of water led from the Wailuku river," and which in 1840 turned out about thirty tons of sugar. Counsel for the Territory contends that that mill was situated on the land of Ponahawai, and was operated by the water from the ditch which branched around to the south of the upper Halai hill. The award of Punahoa recites that the land had been given to the Sandwich Islands Mission by the King and Kaahumanu about the year 1827, and there was testimony tending to show that Mr. Goodrich operated a sugar mill by water power on the mission premises between 1827 and 1837. And there was testimony to the effect that from 1848 to 1853 the mill of a sugar plantation on Ponahawai

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conducted by some chinamen was operated by water obtained from the mission ditch. The Hilo Boarding School was established in the year 1836 and since then the water of this ditch has continually been used for domestic purposes and to some extent for irrigation on the school premises. Since 1888 it has been used also for power purposes at the school. There was conflict in the testimony as to the original number of dams in the stream above the intake of the ditch. Some of the witnesses testified that formerly there were not more than two dams, while others testified that there were as many as six or seven. In 1895 the petitioner leased the water of the ditch to the Hilo Electric Light Company for power purposes, and the testimony shows that the company caused some blasting and excavating to be done in the bed of the stream above the intake of the ditch, and repaired the dams and improved their condition and stability with the use of cement. The effect of that work must have been to increase the amount of water diverted into the ditch at times when the flow in the stream was less than normal. The testimony shows that the maximum capacity of the intake is twelve million gallons per twenty-four hours, and Mr. E. D. Baldwin, a witness for the petitioner, testified that he measured the flow at the intake on December 20, 1898, and found it to be eleven million gallons. At that time, he said, about an equal amount was passing down the stream. What proportion of the water then entering the intake actually reached the premises of the petitioner, or the point in the ditch at which the electric light company took the water for power, was not made to appear. What appears to be an inherently weak point in the ditch is at a small gulch called Kalama. At this point, at an elevation of about six hundred feet, the water of the ditch drops into the gulch, flows down it for a short distance, and is taken out by the continuation of the ditch at the opposite side with the assistance of a dam in the bed of the gulch.

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At one time there was a cement dam there, but it was washed away and has been replaced by one of stones. The gulch must be subject to freshets in times of heavy rains. It is evident that whatever quantity of water may enter the intake no greater quantity can pass below Kalama gulch than the capacity of the ditch and dam at that point can carry. Mr. C. T. Bailey, a witness for the Territory, testified that on December 5, 1914, he measured the flow at that point and found that three million one hundred and ninety thousand gallons were flowing over or through the dam while two million four hundred thousand gallons were continuing down the ditch. Apparently, the commissioner, in arriving at the conclusion reached by him, took the measurement made by Mr. Bailey as an important factor. It does not appear whether or not at the time the measurement was taken there was any water flowing in the gulch as distinguished from what was brought in by the ditch. Mr. Bailey further testified that on January 10, 1915, he found one million gallons coming down Kalama gulch, and counsel for the Territory, in this connection, claims that the quantity fixed by the decision of the commissioner is at least one million gallons too much. But this court cannot say, in the absence of testimony, that one million gallons, or any water at all, was coming down Kalama gulch on December 5, 1914.

The commissioner examined and analyzed the testimony with care. We do not feel obliged to review it at length. It was entirely circumstantial so far as the ultimate question as to what quantity of water was flowing in the ditch at and before the date of the award of the land of Punahoa is concerned. The commissioner admitted, as this court must admit, that "it may be only roughly approximated, with a wide possibility of error." We hold the rule to be, in an appeal in a water controversy, that where a question of fact depends on conflicting testimony, the finding of the commissioner ought not to be disturbed if it is supported by sub-

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stantial evidence and does not appear to be contrary to the weight of the evidence taken as a whole, or inherently inequitable. A careful consideration of the evidence in this case, coupled with what we have observed on the ground, affords us no tangible reason for not affirming the decision of the commissioner. The decision was supported by substantial evidence, considering the character of the evidence submitted, which doubtless was the best that could be had under the circumstances, and it cannot be said to be against the preponderance of the evidence, or unfair.

In 1899 a new lease was given to the electric light company in which it agreed to supply the boarding school with water for household purposes and power and light equivalent to ten horse power, and in about the year 1901 the company moved its plant to the north side of the Wailuku river and, since then, has been taking out water at another point of diversion below the intake of the ancient ditch. What effect that may have on the right of the petitioner to continue to take water from the stream through the old ditch, or the quantity which may be so taken, are questions which have not been raised in this case and have not been considered. Since the electric light company moved its plant it has not used the water of the ditch, and the dams and ditch have not been kept in the best of condition. The petitioner has, however, granted to other parties the right to use the water of the ditch for fluming and other purposes.

The decision of the commissioner adjudicating the right of the petitioner to take and divert from the Wailuku stream at the intake of the ditch a maximum quantity of five million five hundred and ninety thousand gallons of water each twenty-four hours for use for power, irrigation and domestic purposes as an appurtenance of its premises at Punahoa, with the right to repair and maintain the dams in the stream and also the ditch in its course over and across the land of Piuhonua, is affirmed.

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A. G. Smith, Deputy Attorney General, for appellant.

E. W. Sutton (*Smith, Warren & Sutton* on the brief) for appellee.

HO TONG, JOSEPH YAP, M. F. CHUNG, ALFRED Y. LEE, HO FOOK YIN AND HARRY H. KONG, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF CRESCENT JEWELRY COMPANY, v. H. K. HOPE, DEFENDANT IN ERROR, BANK OF HAWAII, LIMITED, GARNISHEE.

No. 974.

ERROR TO DISTRICT MAGISTRATE OF HONOLULU.

ARGUED FEBRUARY 6, 1917.

DECIDED FEBRUARY 17, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

LANDLORD AND TENANT—*lease—action for rent.*

The fact that a tenancy under a lease is terminable at the option of the lessor after a certain date does not render the lease void or constitute a defense to an action for rent accruing prior to that date.

OPINION OF THE COURT BY COKE, J.

Plaintiffs in error bring a writ of error for the purpose of correcting certain alleged errors of law committed by the district court of Honolulu, directed particularly to the action of the district court in sustaining defendant's demurrer to plaintiffs' first cause of action set out in their complaint.

Plaintiffs brought an action of assumpsit in the district court of Honolulu against the defendant setting forth in their complaint several causes of action. The first cause of

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action, and the only one with which we have to deal in this opinion, is based upon a claim for rent alleged by plaintiffs to be due them from the defendant under the terms of a written contract of lease, which lease was attached to and made a part of the complaint. Defendant interposed a demurrer to the first cause of action which was sustained by the district court. This is assigned as error by the plaintiffs. Briefly, the first cause of action sets forth that on the 22d day of April, A. D. 1916, the plaintiffs and defendant entered into and signed a lease in writing, a copy thereof being attached to and made a part of the complaint and marked exhibit "A;" that among other things it was provided in said lease that in consideration of the privilege of using the space required to carry on his business the defendant was to pay a monthly rental of \$47.50 in advance on the first day of each month commencing on the 1st day of May, A. D. 1916; that defendant entered into possession on the 1st day of May, 1916, and paid the stipulated rent for that month; that the rent for the months of June and July became due and payable on the first day of each of these months, and although demanded so to do, defendant failed, refused and neglected to pay the same, and the amount thereof, to wit, \$95, became due from defendant to plaintiffs. The lease referred to contains the following provision:

"That the term of this space privilege covers the same period of time which we have on the premises but subject to a right of cancelling this privilege at any time after the 1st day of August, 1916, you (lessee) to vacate the same one month after receiving such notice of cancelation."

Counsel for defendant urges that the contract of lease is void for want of mutuality for the reason that the lease reserves a right of cancelation to the lessors without a corresponding right reserved to the lessee. We can see no merit in this contention. Clearly a clause of this nature consti-

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tutes no bar to an action at law for the recovery of rent due lessors under the provisions of the lease.

Counsel for defendant further urges, both in his brief and in the argument before this court, that the demurrer was properly sustained on the ground that the first cause of action contained in plaintiffs' complaint failed to allege that plaintiffs possessed a lease of the premises equal in time to or coextensive with the demise to the defendant. We are of the opinion that the lease contains a definite demise from plaintiffs to defendant up to the 1st day of August, 1916, and that the complaint, although crudely drawn, sufficiently sets forth a cause of action for the recovery of rent accruing prior to that date.

It is well established in this jurisdiction that "rigid rules of pleading are not required in district courts," *McKeague v. Helen*, 3 Haw. 328; *Hawaii Mill Co. v. Andrade*, 14 Haw. 500; *Coombs v. Rogers*, 22 Haw. 91.

We hold that the district court erred in sustaining the demurrer.

The judgment of the district court is reversed and the cause remanded with instructions to overrule the demurrer of the defendant and for further proceedings consistent with the views herein expressed. Costs awarded to the plaintiffs.

H. L. Grace and *C. S. Davis* for plaintiffs in error.

E. C. Peters for defendant in error.

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MELLIE E. HUSTACE v. J. R. DAVIS AND JAMES BICKNELL, DEFENDANTS, AND JAMES BICKNELL, AUDITOR OF THE CITY AND COUNTY OF HONOLULU, GARNISHEE.

No. 957.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED FEBRUARY 13, 1917.

DECIDED FEBRUARY 27, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

PRINCIPAL AND SURETY—*building contracts—changes in plans.*

Where a building contract provides that the owner shall have the right to order changes to be made in the work a surety on the bond of the contractor is deemed to have assented in advance to the making of changes, and he will not be released from liability unless the changes made were of such a character as could not reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into.

SAME—*written order for changes.*

Where a building contract contemplated the making of changes in the work and provided that the making of changes should not affect the validity of the contract, and provided also that no changes should be made except upon the written order of the architect, held that where certain changes were made pursuant to the requirement of the owner and upon the verbal order of the architect, the surety on the bond was not released by reason of the fact that the architect's order was not made in writing.

SAME—*extension of time for performance.*

Where a building contract contemplated an extension of the time for performance for a period equivalent to any delay that might be caused by the owner if written claim for such extension should be presented within forty-eight hours of the occurrence, held that where delay had been caused by orders for changes in the work and the architect allowed a definite extension of time, the surety

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on the bond was not released from liability by reason of the failure of the contractor to make written application for an extension.

SAME—*deviations from terms of contract in method of procedure or performance.*

Departure from the terms of a building contract in the method of procedure or performance in the manner of carrying out the contract, as in the matter of making payments, will not release the surety on the bond unless the deviations tended to prejudice his rights.

TRIAL — *instructions.*

It is reversible error to refuse to give a requested instruction which is accurate, applicable and material to an issue involved in the case where the charge given to the jury does not cover the point.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action against the principal and surety on a builder's bond, in which there was a verdict for the plaintiff against the principal but in favor of the surety. The plaintiff brings exceptions.

There was evidence to the effect that on October 24, 1910, Mrs. Hustace made a contract with Davis for the furnishing of the materials and labor for and the erection on her premises at Waikiki, Honolulu, of a two-story residence, according to plans and specifications, for the sum of \$7116; that the contractor gave a bond in the sum of \$3558, with the defendant Bicknell as surety, conditioned for the performance on his part of the covenants, conditions and agreements contained in the contract, and that he would pay for all material used and labor employed in the performance of the contract and save Mrs. Hustace harmless from all liens, suits, damage, etc. In this action the plaintiff claimed the sum of \$1952.48, which was made up as follows: Davis was credited with the sum called for by the contract, \$7116; extras accruing from changes ordered by Mrs. Hustace, \$456.74; and an extra charge allowed for a concrete floor not

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required by the plans, \$325. And the contractor was charged with two cash payments made to him amounting to \$4500; cash paid to material-men, \$2966.41; payments on judgments and to settle other liens filed by material-men, \$1588.64; costs in lien cases, \$237.95; deductions made by the architect, including penalty for failure to complete the work in time (27 days, at \$15, \$405), \$517.88; and an item designated "premium on policy," \$39.34, as to which we find no evidence in the record. The verdict of the jury was against Davis for the sum of \$1435.76, which would seem to have been arrived at by deducting from the amount claimed by the plaintiff the sum of \$516.72, which was the amount paid to discharge one of the judgment liens. The plaintiff's exceptions are to certain rulings made by the court below on the admission of evidence, to the instructions given or refused, to the verdict, and to the overruling of a motion for a new trial.

Counsel for the defendant Bicknell contends that upon the evidence the surety on the bond was released from liability and that a motion for a directed verdict in favor of the surety, which was made when both parties had closed their evidence, ought to have been granted, and that, if so, any errors that may have occurred in the instructions given the jury were harmless and need not be discussed. The several grounds on which the motion for the directed verdict in favor of the surety was based will be considered in connection with the evidence bearing thereon. The first ground was as follows: "That the owner without the consent of the surety and in the absence of a written order of the architect therefor, altered the building contract of October 24, 1910, by ordering and causing to be performed certain substantial extras upon the building subject to the contract, contrary to the provisions of Article 3 of said building contract." Article 3 of the contract provided that "No altera-

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tions shall be made in the work except upon written order of the architect," and a paragraph in the specifications, which were made part of the contract, provided that "The owner shall have power to require alterations in the work shown or described in the drawings or specifications, and the contractor shall proceed to make such changes without causing delay. In every such case, the price agreed to be paid for the work under the contract shall be increased or decreased, as the case may require, according to a fair and reasonable valuation of the work added or omitted, and the value of such work shall be fixed by fair admeasurement and valuation, made by the architect, or by some competent person appointed by him. Such alteration or variations shall in no way render void the contract, and no claim for variations or alterations, or the increased or decreased price thereof, shall be valid, unless done in pursuance of an order from the architect, and notice of such claim made to him in writing before the commencement of such work." The evidence shows that the owner required certain changes to be made in the work which called for the alteration of partitions, additional doors, wood work, hardware and labor for which the contractor rendered a bill for \$714.70 and the architect allowed \$456.74. The architect testified that he had given an order for this extra work orally, but not in writing. Although there are cases holding the contrary, we believe the sound rule to be that the reducing of a verbal order for changes in the work to writing is an immaterial formality so far as the surety on the bond is concerned and that the lack of a written order will not release him from liability. *Hohn v. Shideler*, 164 Ind. 242; *Hinton v. Stanton*, 165 S. W. (Ark.) 299; *Bartlett v. Illinois Surety Co.*, 142 Ia. 538, 553. It is also contended that the changes ordered and made were material alterations in the plans which, as matter of law, released the surety. It is argued that sureties are favorites of the law and a contract of suretyship must be strictly

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construed to impose upon the surety only those burdens clearly within its terms and must not be extended by implication or presumption. In the case of *Territory v. Pacific Coast Casualty Co.*, 22 Haw. 446, 450, this court said, "There is no principle of law better settled than that a surety has the right to stand upon the very terms of his contract." But here, one of the "very terms" to which the surety had assented was that the owner could require alterations in the work and that the contractor should make them. In a case such as this the surety is not released by the making of material changes but by such only as cannot reasonably be said to have been within the contemplation of the parties when the contract was entered into. It is well settled that where a building contract provides that the owner shall have the right to order changes to be made in the work the sureties for the contractor are deemed to assent in advance to the making of the alterations, and if they are made, although they may be material, the sureties are not released thereby. *United States v. Freel*, 92 Fed. 299, 99 Fed. 237, 186 U. S. 309; *McMullen v. United States*, 167 Fed. 460, 222 U. S. 460; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 61; *Fidelity etc. Co. v. Robertson*, 34 So. (Ala.) 933; *Smith v. Molleson*, 148 N. Y. 241; *Hohn v. Shideler*, *supra*. The circumstances may be such in a particular case that the court would hold as matter of law that the alterations were of such a radical character that they could not be supposed to have been within the contemplation of the parties, or, on the other hand, of such a reasonable and ordinary description that the court could say that they must have been contemplated. Between those two propositions there is a middle ground where the circumstances might be such that reasonable men's conclusions may differ, and in such cases the question should be left to the jury under proper instructions. See *Bartlett v. Illinois Surety Co.*, and *Hinton v. Stanton*, *supra*. In the case at bar it cannot be said that the

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alterations were such that, as matter of law, they effected the release of the surety, and the contention of counsel for the appellant goes no further than that the question should have been submitted to the jury. It appears that the item of \$325 for a concrete floor allowed as an extra and credited to the contractor in the plaintiff's account was not work done under the contract but outside of the building in question and pursuant to an independent agreement between Mrs. Hustace and Davis. It should have no place in this case. In this connection counsel for Bicknell contends that the charge made for material for cement work (\$436.19) was an improper one. There was, apparently, some cement work done under the contract, but unless the plaintiff be able to segregate the charge for such material as was used under the contract from that connected with the independent agreement she should not recover in this case for any part of it. The next ground of the motion was, "That the owner without the consent of the surety extended said contract beyond the ninety working days allowed under the provisions of Article 6 of the building contract." The contract obliged the contractor to complete the work within ninety days of its date. But there was a further provision to the effect that should the contractor be delayed in the prosecution of the work by the act of the owner the time for the completion could be extended for a period equivalent to the extent of the delay which was to be determined by the architect, "but no such allowance shall be made unless a claim therefor is presented in writing to the architect within forty-eight hours of the occurrence of the delay." There was evidence to the effect that because of the alterations ordered by the owner the architect had extended the time for the completion of the work for fifteen days. This, of course, was within the provisions of the contract. It was not shown that the contractor made a written claim for an extension within forty-eight hours as provided in the con-

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tract, but the omission was that of the contractor and of no one else. The surety would not be discharged by the mere neglect of his principal to file a claim in writing. Other grounds of the motion were that the architect neglected to issue monthly certificates certifying the approximate value of the work performed; that the owner made payments to the contractor without certificates of the architect; and that the owner failed to make monthly payments on account of the contract on certificates of the architect, all contrary to the provisions of Article 9 of the contract. The 9th article provided that payments should be made monthly and only upon certificates issued by the architect as to the approximate value of the work performed, twenty per cent. of the amount to be retained by the owner until formal acceptance of the building by the architect within thirty days after its completion. It was not shown when the work was commenced, but the two certificates of the architect upon which payments were made to the contractor were dated respectively December 5, 1910, and January 14, 1911. The certificates did not show upon their face that twenty per cent. of the value of the work done was deducted, but the architect testified that such was the fact and that the amounts specified in the orders were the net amounts due the contractor. No other sums were paid to the contractor. In this class of cases the courts have properly drawn a distinction between changes in the contract or in the work to be performed, and a departure from the terms of the contract relating to the method of procedure or performance in the manner of carrying out the contract. As to the latter, deviations will not result in the release of the surety unless they tend to prejudice his rights. *Martin v. Whites*, 128 Mo. App. 117, 122; *Monro v. Nat. Surety Co.*, 92 Pac. (Wash.) 280; *Smith v. Molleson*, *supra*. An immaterial deviation from the terms of the contract in the matter of making payments will not release the surety on the bond. *New Haven*

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v. Nat. Steam Economizer Co., 79 Conn. 482, 489. We think the principle is applicable here. The contractor was not paid more than was due him, and the fact that the certificates were not issued and the payments made on the exact monthly dates in no way, so far as appears, tended to injure or prejudice the surety. Further grounds of the motion were that the owner made payments to material-men; and failed to retain twenty per cent. of the contract price and extras until the formal acceptance of the building by the architect as required by the provisions of the contract. It is not clear from the testimony just what happened after the second payment had been made to the contractor. There was some indefinite testimony tending to show that a third certificate was issued by the architect and that the owner refused to make payment upon it. On March 25, 1911, the contractor gave an order on the owner in favor of a material-man for \$2377.78 and it was honored. It appears that another material-man was paid \$152.44 with the contractor's consent or upon his order. Several liens were filed. The owner occupied the building on April 1, but the contractor had exceeded his time limit and the architect refused to accept the building. As above shown, the payments which the owner was obliged to make exceeded the amount due and payable under the contract. We see nothing in these circumstances which could properly be held to constitute a discharge of the surety. Whatever complications had arisen appear to have been caused by the defaults of the contractor. We hold, therefore, that the motion of the surety for a directed verdict in his favor was properly refused.

The trial court declined to give all but one of the instructions requested by the plaintiff and charged the jury of its own motion. The plaintiff excepted generally to "the court's giving of its instructions—his written instructions." Such a general exception could be sustained only in the event that the instructions were bad throughout. *Territory*

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v. *Lau Chong*, 20 Haw. 235; *Territory v. Peter*, 22 Haw. 132. Here, though there were evident errors, it cannot be said that the charge as given was entirely bad.

In his brief counsel for the appellant contends that plaintiff's requested instructions Nos. 7, 8, 9 and 10 were erroneously refused. By number 7 the court was asked to instruct the jury that the judgments rendered in the lien cases of *Lewers & Cooke, Ltd.*, and *Lucas Bros.* are conclusive upon the defendants in this case. An inspection of the records in those cases which were put in evidence shows that the plaintiffs claimed the value of materials furnished for the construction of a building by Davis upon the premises of Mrs. Hustace, but it did not appear upon the face of either record that the building for which the materials were furnished was the one which was erected under the contract of October 24, 1910. There was evidence in this case from which the jury were authorized to find as a fact that those materials were used in the construction of the building under this contract. But the instruction went too far in saying that the judgments were "conclusive"—which we take to mean conclusive as matter of law—since it was necessary to supplement the records with evidence identifying the contract referred to in them with the contract for the performance of which the defendant Bicknell was surety. The instruction in the form requested was properly refused. By numbers 8, 9 and 10 the court was requested to instruct the jury that "you may include in your verdict" the cash payments made to the contractor, the amounts paid to material-men upon the orders of the contractor, and the amount of the costs and expenses incurred by the plaintiff in connection with the lien cases. The requested instructions were defective and properly refused. The sum of the different amounts referred to in the instructions was many times the amount claimed in the action. Probably what was meant to be stated was that in ascertaining the balance due

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the plaintiff the jury should take into consideration the several matters mentioned, but if so, the intent was not expressed.

There was, however, one instruction requested by the plaintiff, bearing upon the liability of the surety, which contained a correct statement and which ought to have been given to the jury. It was as follows:

"5. I charge you that the provision in the contract that no alterations shall be made in the work except by written order of the architect does not preclude the making of alterations without such written order, that provision being principally for the protection of the owner against the claim of the contractor that alterations were made with the owner's consent, when in fact such consent was not obtained, and alterations so made with the consent and approval of the owner and architect will be held to be done under the contract."

That instruction was accurate, applicable and material to the point it referred to and was not included in the charge given by the court. The refusal to give it constituted error. *Nawelo v. von Hamm-Young Co.*, 20 Haw. 644.

The exceptions to the refusal to give plaintiff's requested instruction number 5, and those to the verdict and the ruling denying the motion for a new trial are sustained, and a new trial is granted.

C. S. Davis for plaintiff.

E. C. Peters for defendant Bicknell.

Syllabus.**TERRITORY v. LAU HOON.**

No. 966.

ERROR TO CIRCUIT COURT, FIFTH CIRCUIT.**HON. L. A. DICKEY, JUDGE.****ARGUED FEBRUARY 21, 1917.****DECIDED MARCH 2, 1917.****ROBERTSON, C.J., QUARLES AND COKE, JJ.****INDICTMENT AND INFORMATION—*allegation by inference.***

An indictment charging bribery which substantially follows the language of the statute but alleges a material fact by inference is sufficient under our criminal procedure, supplemented by Act 215, S. L. 1915, adopting section 3791E R. L., under which an allegation that the accused gave a bribe to an officer with *intent* to influence him in the discharge of his duty, alleges by inference that the accused had knowledge of the official character of such officer and is sufficient.

BRIBERY—*allegation and proof—directed verdict.*

An indictment charging bribery of an officer to influence him to refrain from arresting players in a che fa game alleged that such game was then being carried on; the evidence failed to show that any such game had been carried on; the defendant moved for an instructed verdict in his favor, which motion was denied: Held, that the motion for an instructed verdict should have been granted.

SAME—*corrupt intent—completed crime.*

The gist of the crime of bribery is the corrupting or the attempt to corrupt an official in the discharge of his duty and is complete when the accused has done all that he can do to consummate the crime, it not being necessary that the officer accepting the bribe do so with a corrupt intent.

OPINION OF THE COURT BY QUARLES, J.

The defendant was indicted, tried and convicted of the offense of bribery. The case comes before us on writ of

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error, the errors assigned being that the court erred in the following particulars: (1) In holding that the indictment states facts constituting the crime of bribery; (2) in permitting the jury to consider certain hearsay evidence; (3) in refusing to grant defendant's motion for a directed verdict; (4) in that the verdict is contrary to law; (5) in that the verdict is contrary to and not sustained by the evidence; (6) in that the court and jury erred in returning a verdict against the defendant; (7) in failing to enter any judgment against the defendant; (8) in that there is no judgment to support the verdict; and (9) in denying defendant's motion for a new trial. The indictment in the charging part alleges that the defendant, on the 17th day of December, 1915, at Lihue, "* * * unlawfully, wickedly and corruptly did offer and give to one Enoka Lovell, a police officer, the sum of thirty dollars lawful money, as a gift, with intent then and there to influence his opinion in a matter, to wit, not to arrest players at che fa games then and there being carried on unlawfully at Huleia, Lihue, Kauai, that may by law come before him in his capacity as a police officer, and did then and there commit the crime of bribery." Counsel for defendant contends that the said indictment was insufficient in that it did not state that the officer alleged to have been bribed was a police officer in the jurisdiction of Huleia where the alleged gambling was being carried on; and in failing to allege knowledge on the part of the defendant that said Enoka Lovell was a police officer. We think that the indictment, while inartistically drawn, substantially followed the language of the statute and stated an offense under the liberal provisions of our criminal procedure, supplemented by Act 215, S. L. 1915, wherein it is provided at page 308 and in section 3791E that "No indictment * * * is invalid or insufficient for the reason merely that it alleges indirectly and by inference instead of directly any matters, facts or circumstances connected with

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or constituting the offense, provided that the nature and cause of the accusation can be understood by a person of common understanding." Without passing on the question as to whether or not a police officer in the district of Lihue may make an arrest in another district of his county we suggest that the indictment indirectly avers that Enoka Lovell was a police officer at Huleia. The indictment alleges that the averred act was done with the intent then and there to influence a police officer to not arrest players at the fa games then being carried on. This allegation of intent inferentially alleges that the defendant knew that the party alleged to have been bribed was a police officer and is sufficient under the statute quoted. Prior to the enactment of this statute such an allegation was held sufficient (*The King v. Ah Lou You*, 3 Haw. 393).

The second assignment of error has been abandoned as no exception was taken at the trial to the admission of the alleged hearsay evidence.

The third error assigned relates to the refusal of the court to grant defendant's motion for a directed verdict. At the close of the evidence for the Territory the defendant moved for a directed verdict upon the ground that there was no evidence to show that a che fa game was being carried on at Huleia and that the allegation in the indictment that such games were then being carried on is a material fact alleged in the indictment and which it was necessary to prove. Under section 4036 R. L. the crime of bribery may be committed in any "case, question, proceeding or matter pending, or that may by law come or be brought before him (the officer) in his capacity as aforesaid." The indictment in the case at bar alleged that the che fa game was then and there being carried on and was sufficient to show that the question of arresting the players in that game was one that might come before the police officer and upon which he would be called to make an arrest. The prosecution having

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alleged that a che fa game was then being carried on it was a material fact and one which devolved on the prosecution to prove. There is not a scintilla of evidence in the case to show that any che fa game was being carried on at Huleia and for that reason the motion for a directed verdict should have been sustained.

This necessarily requires the granting of a new trial and renders it unnecessary to pass upon all of the errors assigned, but inasmuch as the case must go back for a new trial we deem it proper to suggest that evidence of knowledge on the part of the defendant as to the official character of the officer alleged to have been bribed ought to be introduced and that this may be done by proof of circumstances. While the evidence in the record shows such knowledge by inference, the inference is a weak one. It may be that the police officer had been in office for a number of years; that he wore a uniform, a badge, or both; and that the defendant had met him frequently under such circumstances. As a rule all material facts alleged in an indictment should be proven by the prosecution and the proof should be clear and convincing. But an opinion entertained or knowledge possessed by an accused is frequently a matter not susceptible of direct proof and can only be shown by circumstances.

Counsel for the defendant takes the position that the offense was not completed and that the evidence only shows an attempt to bribe the officer, arguing that a corrupt intent upon the part of both the defendant in giving and of the officer in receiving is necessary to complete the offense of bribery. To sustain this position counsel cites *People v. Peters*, 265 Ill. 122. By statute in Illinois bribery, when consummated, is made a felony as to both parties and punishable by imprisonment in the state penitentiary for not less than one nor more than five years, while an attempt to bribe is made punishable by a fine not exceeding \$5000.

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The evidence tends to show that the defendant went to Enoka Lovell and made him a proposition to pay him fifty dollars a month for the protection of a che fa game to be conducted at Huleia; that at the time said that he only had thirty dollars, which he gave Enoka Lovell, telling him that he would soon deliver the other twenty; that early the next morning the police officer went to the sheriff, gave him the thirty dollars and informed him of the defendant's proposition. From the proven facts it is argued that there was no corrupt intent on the part of the police officer and therefore the crime of bribery was not consummated. The gist of bribery is the corrupting or attempt to corrupt an official in the discharge of his duty, and when a defendant has done all that he can to consummate such purpose he has committed the offense whether he brings about the desired result or not. A corrupt intent on the part of the party accepting the bribe is not necessary (9 C. J. 404; 4 R. C. L. 178; *Commonwealth v. Murray*, 135 Mass. 530; *People v. Bunkers*, 2 Cal. App. 197; *Minter v. State*, 70 Tex. Cr. 634). The bribe may relate to a future offense as well as to a present one (*Minter v. State, supra*).

If there was sufficient evidence in the record from which the jury could find that a game of che fa was being conducted at Huleia the defendant would not be entitled to a new trial, but, as before suggested, the absence of any evidence on this point entitles him to a new trial.

The judgment sentencing the defendant to pay a fine of \$500 and costs of court is reversed and a new trial granted. The cause is remanded to the circuit court for further proceedings consistent with this opinion.

Fred Patterson for plaintiff in error.

S. K. Kaeo, County Attorney of Kauai, for the Territory.

RE TAXES WAIOHINU AGR. CO., 23 Haw. 621. 621

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IN RE TAXES WAIOHINU AGRICULTURAL &
GRAZING COMPANY, LIMITED.

No. 969.

APPEAL FROM TAX APPEAL COURT, THIRD CIRCUIT.

SUBMITTED FEBRUARY 20, 1917.

DECIDED MARCH 6, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

PUBLIC LANDS—*general lease.*

A lease of public land for a term of twenty-one years, which is designated upon its face to be a "general lease," and which does not come within the category of any other kind of lease described in R. L., 1915, Chap. 30, relating to public lands, held to be a general lease within the meaning of said chapter notwithstanding it included a provision allowing the lessor to withdraw the land or any portion thereof at any time during the term for homestead, settlement or public purposes.

CONSTITUTIONAL LAW—*taxation—leases of public lands.*

Section 385, R. L. 1915, providing that the value of general leases of public lands, for the purpose of taxation, shall be taken to be the value of the fee of the land demised, as applied to leases made subsequent to the enactment of the statute, held not to deprive the lessee of property without due process of law, or deny him the equal protection of the laws, in violation of the Fifth or Fourteenth Amendments.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal by the taxpayer from a decision of the tax appeal court of the third judicial circuit involving the taxation of a leasehold of government land. The tax appeal court sustained the assessment of the leasehold at the value of \$54,879. The appellant admits that the assessment is not excessive if the leasehold is taxable at the value of the fee of the land, its contention being that the lease, if taxable at all, is taxable only at its actual value.

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The lease in question (General Lease No. 631) was executed by the commissioner of public lands and the corporation appellant on the 18th day of May, 1908. The term was twenty-one years commencing October 1, 1908; the annual rent reserved was \$1001 "over and above all taxes, charges and assessments to be levied or imposed thereon by legislative authority;" the lessee covenanted to pay "all taxes, charges, impositions and assessments, ordinary or extraordinary, which may hereafter, at any time during the continuance of the said term, be laid, imposed, assessed or charged on the said demised premises, or any part thereof;" and there was a provision that the lessor could at any time during the term withdraw the land demised or any portion thereof for homestead, settlement or public purposes, the rent to be reduced in proportion to the value of the land so withdrawn.

Section 1242 of the Revised Laws provides, *inter alia*, that the interest of any tenant or lessee of any land that is exempt from taxation, or the owner of which is exempt from taxation, shall be assessed to such tenant or lessee in respect of the value of his interest therein. But section 385 provides that for the purpose of taxation the value of general leases (of government land) shall be the value of the fee of the real estate demised and the lessees shall be assessed thereon accordingly.

On behalf of the appellant it is contended that the lease is not a "general" lease within the meaning of the statute since a general lease (other than of agricultural land) is one "for any number of years not to exceed twenty-one" (R. L. 1915, Sec. 380) whereas the lease in question is terminable at the option of the lessor. But this lease is designated upon its face as a "general lease," and it does not come within the category of any other kind of lease described in the chapter of the Revised Laws relating to public lands. It was for the term of twenty-one years, and we think it

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must be held to be a general lease notwithstanding the provision relating to the withdrawal of the land, or portions thereof, for certain specified purposes at the option of the lessor. The case of *Trammell v. Faught*, 74 Tex. 557, cited by the appellant, in which it was held that a lease for a term of years terminable by the lessor in the event that the land should be sold was not a lease "for a term of three years or more" within the meaning of the statute there construed, does not convince us that the appellant's lease is not a general lease within the meaning of our statute. The lease in hand was one for a term of years, and the tenancy was not rendered one at will by reason of the option reserved by the lessor. See 1 Tiffany, Real Prop., Secs. 39, 80; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 807.

Counsel for the appellant contend further that in the event that it should be held that the lease in question is a general lease and liable to taxation as provided in section 385 of the Revised Laws, the section is in conflict with the Fifth and Fourteenth Amendments of the Constitution because it authorizes the taxation of the appellant's lease at an arbitrary valuation many times in excess of its actual value, and, in doing so, deprives the appellant of property without due process of law, also that the appellant is deprived of the equal protection of the laws because of the discrimination between leaseholds of public and non-public land, and, as to leases of public land, between those executed prior to 1895 and those executed subsequent to that year. The provision of section 385 was first enacted as section 25 of the Land Act of 1895 of the Republic of Hawaii. It was in force at the time of the execution of the lease in question, and still is in force. Perhaps there would have been merit in the contention of counsel if the statute had been enacted at a date later than that of the lease. See *Boston Molasses Co. v. Com.*, 193 Mass 387. But as it is we are unable to see wherein the appellant has been, or is

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to be, deprived of property without due process of law, or is deprived of the equal protection of the laws. We need not stop to consider whether, in view of the fact that section 73 of the Organic Act provided that the laws relating to public lands, except as therein changed, should continue in force until Congress shall otherwise provide, the legislature of Hawaii could have repealed or amended the provision of section 385 of the Revised Laws if it had so desired. Neither need it be considered whether, in view of the organic provision, section 385 should be regarded as legislation of Congress as distinguished from legislation of the Territory, nor the further possible question whether the Fourteenth Amendment applies to Territories. It has long been settled that the constitutional provisions referred to do not prevent the classification of property for taxation purposes where there is any reasonable basis therefor. The obvious difference between a leasehold of privately owned land, the value of the fee of which is assessable against the owner, and one of public land, the fee of which is not taxable, affords a tangible and reasonable basis for a classification and a different method of assessment. And we think that the provision that the value of leaseholds of public lands should be taken as that of the fee of the land demised even though it may greatly exceed the actual value of the leasehold interest is not, under the circumstances, open to objection. The legislative power of the Territory, if not restricted, would include the right to prescribe the terms and conditions under which public lands may be leased. Here, as we have seen, the preexisting laws relating to public lands, including, presumably, the provision relating to the taxation of general leases, were expressly continued in force by the Organic Act. We are impelled to presume that the lessee took the lease and covenanted to pay the taxes voluntarily and with knowledge that the statute expressly required that the value of the lease would be assessed for

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taxes as of the value of the land. The other alleged discrimination between general leases made prior to the enactment of 1895 and those made since arises merely from the fact that the original enactment was expressly made to operate prospectively. Aside from any question as to the right of the legislature to make the provision applicable to leases theretofore made, we have no doubt as to the propriety and validity of the prospective feature of the enactment which resulted in the classification referred to and the exemption of previously executed general leases, which counsel have called a discrimination.

The decision of the tax appeal court is affirmed.

Frear, Prosser, Anderson & Marx for the taxpayer.

I. M. Stainback, Attorney General, for the assessor.

M. F. SCOTT, ET ALT., v. E. N. PILIPO, ET AL.

No. 978.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED FEBRUARY 12, 1917.

DECIDED MARCH 6, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

EQUITY—reference—master's report—estoppel.

Certain matters in an equity suit were referred to a master with instructions to proceed as speedily as possible and report within sixty days or show excuse for not so doing; the master held hearings after the sixty days had expired and made reports which were confirmed without objection on the ground that they were not filed within time; from a supplemental decree allowing claims for fees and expenses the decree appealed from was attacked on the ground that the master having failed to file his report within the required time the report and the decree con-

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firming it were without jurisdiction and void: Held, that the question of time was not jurisdictional and the parties having acquiesced in the work of the master after the expiration of the sixty days and received the benefits of his labors are estopped from attacking his report on the ground that it was not filed within time.

JUDGMENT—*res adjudicata*.

Where the jurisdiction of a circuit judge sitting in equity in a partition suit to appoint a master in chancery and refer certain matters to him has been adjudged favorably in prohibition proceedings, a decree later rendered confirming the master's report is not subject to attack on the ground that the circuit judge did not have jurisdiction to appoint the master, that question being *res adjudicata* by reason of the decision in the prohibition proceedings.

SAME—*same*.

A circuit judge allowed a master in chancery a fee out of a fund in court in a pending suit whereupon plaintiffs petitioned the supreme court for a writ of prohibition against the circuit judge and master prohibiting them from proceeding further with the suit on the ground of disqualification by reason of pecuniary interest; the writ was denied; plaintiffs appealed from the decree thereafter made in the suit assigning as one of the errors the disqualification of the circuit judge and master: Held, that the decision in the prohibition proceedings was conclusive on the question of disqualification of the judge and master, and, *res adjudicata*.

PARTITION—*attorney and client—attorney fees*.

In a partition suit attorney fees should not be allowed certain defendants where the evidence showing that the services of such attorneys tend to the common benefit of all the cotenants is too indefinite and vague to establish the value and beneficial character of such services.

SAME—*cotenant—accounting for rents*.

Where a supplemental petition is filed in a partition suit, wherein the parties are numerous, praying that process issue against one who has succeeded to the interest of one of the cotenants and collected rents from others occupying a portion of the lands to be partitioned the prayer of the supplemental petition should be granted and an accounting required in the partition suit, all of the parties thereto being interested in the rents.

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OPINION OF THE COURT BY QUARLES, J.

At the time the petition for a partition of the lands herein partitioned was filed (September 3, 1897) the lands of Holualoa 1 and 2 were owned by the Hui Aina of Holualoa in which hui there were originally 400 shares, but the hui later purchased from shareholders 46.75 shares, leaving outstanding shares to the extent of 353.25. October 1, 1898, the circuit judge sitting at chambers in equity (hereinafter for convenience called the court) made a decree appointing W. A. Wall and J. D. Paris commissioners to view the lands sought to be partitioned and report to the court what parts of such lands were susceptible of division in kind without injury to the parties and what portions, if any, were not susceptible of such division; what parts, if any, should be sold and the manner best suited to make partition among the parties. February 2, 1899, the said commissioners reported to the court recommending that certain of the lands be sold and the rest of the lands be divided in kind among the shareholders in proportion to the shares held by each. June 13, 1899, a supplemental decree was entered by consent of parties directing a sale of certain of the lands by the commissioner, Mr. Wall, and thereafter such sale was made and report of the sale made by the commissioner, and which was confirmed December 14, 1903. December 17, 1903, on the petition of the commissioner, an order was made by the court authorizing him to employ some person or corporation to make an abstract showing the various owners, at a cost not to exceed \$750. The commissioner obtained from Castle & Withington a list of shareholders in the hui, considerable time and work being required to make it and for which they were paid \$250. This list purported to show shares outstanding, held by various parties, to the extent of 408.583 shares, and on this basis the money received from the sale (after paying certain costs and ex-

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penses and compensation to the commissioner for services and surveys and maps made by order of the court) was distributed in part among the shareholders shown by the said list at the rate of \$15 per share. October 12, 1903, another order of sale was made directing the sale of 1000 acres of the land and this sale was made in lots and a report thereof made to the court by the commissioner August 24, 1905. To this report objections were filed by Esther N. Pilipo and thirty-three other defendants, shareholders, acting by A. S. Humphreys, Esq., their attorney, and the objections, by stipulation, were continued to be set for hearing after January 1, 1906. The matter of confirming the report of the last sale again came before the court in April and again in May, 1907, when the then circuit judge presiding in equity, without making any order, orally said, as shown by the minutes of the stenographer, that he refused to confirm it at that time for the reason that he felt that some parties interested were not before the court; that the motion would stand and such parties could be brought in. Nothing further appears to have been done until July and August 1913. August 18, 1913, the court signed an order *nunc pro tunc* as of August 24, 1905, confirming the last sale. February 6, 1914, the plaintiff M. F. Scott petitioned that allotments be made to the various parties according to their rights, and with his petition was filed a list and abstract showing the several parties then holding shares and accounting for all of the 353.25 shares outstanding. April 29, 1914, an interlocutory decree was filed granting the prayer of the petition for allotments and directing that deeds in severalty be made by the commissioner to the parties and to the extent therein named. January 28, 1915, the court made an order referring the suit to A. F. Judd, Esq., as a master in chancery. Mr. Judd declined to act and Mr. Joseph Lightfoot was appointed January 30, 1915, master in place of Mr. Judd, with directions to investigate and report the

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condition of the record; to take such further evidence as the parties should present; to ascertain and report the status and condition of the suit; to report whether or not all owners of lands had been made parties; to report findings and conclusions of law and fact; and to report such final decree as the master should recommend be made. To the appointment of such master the plaintiffs objected and applied to this court for a writ of prohibition prohibiting the master from proceeding on the ground that the court had no jurisdiction to appoint a master, but this court held otherwise (*Scott v. Stuart*, 22 Haw. 459). In the said prohibition proceeding the master appeared for himself and the circuit judge and was later allowed a fee of \$100. Thereupon the plaintiffs applied to this court for a writ of prohibition to prohibit the circuit judge and the master from proceeding further on the ground that they were both pecuniarily interested and therefore disqualified, but this court denied the writ (*Scott v. Stuart*, 22 Haw. 641). The master investigated the records, heard much evidence and finally filed his report, findings, transcript of the evidence heard, and draft of the decree which he recommended be made by the court. One result of the work done by the commissioner was the amendment of the petition and the bringing in of more than fifty defendants, some of whom had theretofore voluntarily appeared. In the original petition one hundred and forty-two defendants were named, some of whom had died prior to the reference to the master, some of whom had sold their shares and the purchasers had not been made parties. April 8, 1916, the report of the master was confirmed in all things and a decree confirming the allotments made in severalty to the different parties was filed, and the allotments appear to have been satisfactory to all parties.

A supplemental report was made by the master and filed March 23, 1916, passing upon sundry claims for fees and

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expenses made by the commissioner Wall; by certain defendants acting through Castle & Withington, attorneys; by Esther N. Pilipo and Elizabeth K. Pilipo, acting through E. K. Aiu as attorney; by the plaintiff M. F. Scott for making the abstract hereinbefore mentioned and also for attorney fees paid by plaintiffs. This supplemental report was not passed on in the decree of April 8, but on April 24, 1916, another supplemental decree was filed confirming the said supplemental report and allowing the following claims which are attacked on this appeal, to wit: an attorney fee of \$500 allowed to W. R. Castle and other defendants to be paid to Castle & Withington; an attorney fee of \$250 allowed to Esther N. Pilipo and Elizabeth K. Pilipo to be paid to their attorney E. K. Aiu; to plaintiff M. F. Scott an attorney fee of \$100 paid Thurston & Stanley; the allowance of \$500 in addition to \$500 theretofore allowed J. Lightfoot as master in chancery. The said decree disallowed the claim of W. A. Wall, commissioner, for a balance of \$540, and also a balance of \$112.50 claimed for services; the claim of plaintiff M. F. Scott for making abstract in the sum of \$750 and his claim for attorney fee paid to Charles Creighton in the sum of \$100, with sundry items of cost and expense claimed by plaintiffs. From this last supplemental decree the commissioner, W. A. Wall, and the plaintiffs have appealed. This appeal relates solely to the supplemental decree of April 24, 1916, and to costs and expenses claimed, some of which were allowed and some disallowed, as before shown. Plaintiff M. F. Scott has remitted the allowance of \$100 paid to Thurston & Stanley as an attorney fee and relinquished his claim for a fee paid to Charles Creighton.

The plaintiffs, as appellants, attack the decree generally on the ground that the master and the circuit judge were both disqualified as both had a pecuniary interest in the subject-matter of the suit, and on the further ground that

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the court was without jurisdiction to appoint a master in chancery. These points are *res adjudicata* by reason of the decisions of this court heretofore referred to and found in 22 Haw. on pages 458 and 651, and we will not further consider them.

The plaintiffs also attack the decree appealed from as error on the further ground that the time within which the master was given to hear the parties and make his report had expired long before he presented his report; that his said report was without jurisdiction, null and void; and that the decree confirming it was without jurisdiction, null and void. The order appointing the master to hear the parties, examine the record in the suit and report its status together with evidence taken by him, and draft such decree as he should recommend, contains this provision among others, "that the said master in chancery shall proceed as speedily as possible in the said matters and shall file the report of his doings as aforesaid within sixty days from this date or give sufficient excuse for not so doing." The record shows that the master held a number of hearings, which were attended by parties plaintiff and defendant, more than sixty days after his appointment, without objection, and this point does not appear to have been raised either before the master or before the court. The master did a large amount of work and his recommendations as to the decree apportioning funds arising from sales undistributed and allotments of lands in severalty were substantially accepted and acted upon by the court to the benefit of the parties, all of whom accepted such benefits without question. Now on this appeal from a supplemental decree allowing attorney fees, costs and expenses in part and disallowing such claims in part, for the first time an attack is made upon the jurisdiction of the court and master on the ground that the master did not act within the time required by the order appointing him. We take the

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view that failure to report within sixty days is not jurisdictional and that the plaintiffs by their acquiescence in the actions of the master, and, in receiving the benefits of his work and report without objection on that ground, are now estopped from attacking the report on such ground. The entire record is not before us and it may be that sufficient excuse for not making the report within sixty days was shown below. The reports of the master were properly confirmed by the court, except as herein shown.

The only questions left for us to determine are as to the correctness of the supplemental decree in so far as it allows attorney fees, costs and expenses and disallows claims for other attorney fees, costs and expenses, and refuses to permit the plaintiff M. F. Scott to file a supplemental petition bringing in as a party defendant C. K. Ai for the purpose of having the said Ai account for rents collected for twenty-two acres of the land apportioned under circumstances alleged in said supplemental petition, and we will proceed to consider these questions.

The allowances appearing in said supplemental decree which have not been objected to by the parties herein are approved and will stand. The disallowance of claims, except that of M. F. Scott for \$750 for making an abstract, is approved.

The allowance of \$500 to W. R. Castle, J. B. Castle and the Kona Development Company for attorney fees to be paid to their attorneys Castle & Withington, and the allowance of \$250 to E. N. Pilipo and E. K. Pilipo, attorney fee to be paid to their attorney Eugene K. Aiu, were improper. There is some evidence tending to show that services were rendered by the attorneys named which would tend to the common benefit of all the cotenants, but that evidence is too indefinite and vague and the value and beneficial character of the services were too uncertain to be estimated under the evidence in the record. The two Pilipos were

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shown to have conducted dilatory tactics which retarded the determination of this partition suit for several years to the detriment of all the parties and they are now delinquent in paying into court money wrongfully received by them out of the proceeds of the sale of lands—the common fund—which they have been ordered to repay into court. We hold that the defendants named shall pay their own attorneys and the said attorney fees are disallowed. The bulk of the work has been performed by the plaintiff M. F. Scott personally, while some of it was done by his attorneys for which nothing is to be allowed. The supplemental decree appealed from did allow the plaintiffs \$100, fee paid to their attorneys, but they have remitted the same and withdrawn their claim therefor.

The refusal of the court to allow Mr. Wall his further claims for compensation was authorized under the showing made and such disallowance is approved. Mr. Wall in testifying admitted that he had received for services and expenses in the suit the sum of \$4828.18. The various items, claims and allowances theretofore made to him are not in the record before us. Mr. Wall testified at the hearing before the master that his present claims for further compensation were for services rendered, were reasonable, had not been paid and were not included in any claim theretofore allowed him. The court below had the entire record before it and having found that Mr. Wall had been overpaid and that the present claims presented by him be disallowed we will not disturb its conclusion in this regard. The claims of Mr. Wall which were disallowed in the supplemental decree appealed from are for services rendered in 1916 and appear to have been caused by the incompleteness of the plats of allotments made by him in that such plats did not give courses and distances of the exterior boundaries of the various parcels of land allotted. We do not regard the evidence as sufficient to show that

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these charges are for services that were necessary and not required by reason of Mr. Wall's own course. The conclusion of the circuit judge that Mr. Wall had been overpaid \$3241.69 was, presumably, based upon the theory of the statutory fees allowed commissioners in partition suits are at the rate of five dollars per day. This rule does not apply to services rendered as a surveyor by a commissioner in a partition suit, and where he does the actual surveying and platting he is entitled to reasonable compensation for such services. But where, as in the case at bar, he is required to render further services apparently caused by imperfect or incomplete work done by him, and for which he has been paid, in order to be allowed further compensation he must show by clear and convincing evidence that the additional services for which he seeks compensation were not caused by his own fault, as he is evidently not entitled to compensation for services made necessary by his own fault.

The disallowance of the claim of M. F. Scott in the sum of \$750 for making the abstract in this case was contrary to the evidence and facts shown by the record. An order had been made by the court authorizing Mr. Wall, commissioner, to employ some person or corporation to make an abstract at a cost not to exceed \$750. Mr. Wall was unable to get such abstract at the cost limited by the court. He employed Mr. Scott to make an abstract under an agreement that Mr. Scott was not to be paid anything for it "unless the same was found to be accurate, complete and correct." The abstract made and furnished by Mr. Scott proved to be accurate and correct and was used to the benefit of all the parties and by reason thereof this whole complicated partition suit has been brought to a successful conclusion by the master and court and the evidence shows that it was worth more to make it than the amount charged for it. Different persons engaged in abstracting had refused

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to undertake it at the price limited by the court and which is now claimed by Mr. Scott. We hold that Mr. M. F. Scott shall be allowed \$750 for making and furnishing the abstract.

We hold that the court erred in refusing to permit the filing of the supplemental petition presented by the plaintiffs for the purpose of bringing into this suit C. K. Ai to have him account for rents alleged to have been collected by him under the claim of ownership of the share formerly held by one Kamale, under which claim twenty-two acres of coffee land held by the tenants named in said supplemental petition under lease executed by one Akau who had acquired the Kamale share, the interests of said Akau having passed to said C. K. Ai, as alleged in the proffered supplemental petition. All of the cotenants, plaintiffs and defendants, are interested in such rents which the supplemental petition alleges were collected and received by said C. K. Ai in trust for all of the parties to this suit. The court was in error in deciding that the plaintiffs should sue the said C. K. Ai in their own right. Owing to the large number of parties to this suit and the manifest trouble of bringing them into another suit for accounting the entire matter should be settled in this suit and with that end in view we hold that said supplemental petition shall be filed, that process issue against the said C. K. Ai and he be required to account for the rents collected by him as alleged in said supplemental petition unless he shows a good and proper defense to the matters therein alleged and set forth.

Another supplemental petition was filed by one of the plaintiffs in 1914 and an order to show cause against the said C. K. Ai why he should not be made a party defendant and account for rents received was made and on return of said C. K. Ai to the said order to show cause the said order was vacated, from which order so vacated an appeal was had to this court. On that appeal the order vacating

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was affirmed on the ground that facts were not alleged in the supplemental petition showing that the said C. K. Ai was interested in the subject-matter of the suit, there being no allegation therein that he was either a cotenant or the lessee of a cotenant (22 Haw. 252). The allegations contained in the supplemental petition here in question take this matter out of the former ruling of this court.

The supplemental decree appealed from is vacated and the cause is remanded to the circuit judge with instructions to make a full and supplemental decree disposing of the matters herein considered in conformity with the conclusions and views herein expressed.

M. F. Scott for plaintiffs.

D. L. Withington (*Castle & Withington* on the brief) for certain defendants.

E. K. Aiu for certain defendants.

W. J. Robinson for W. A. Wall.

TERRITORY *v.* R. T. SNYDER.

No. 968.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED MARCH 5, 1917.

DECIDED MARCH 8, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

CRIMINAL LAW—*motion to change plea after verdict—discretion of court.*

It is not an abuse of discretion for the trial court after a plea of guilty and sentence in a misdemeanor case to refuse defendant's motion to change his plea from that of guilty to that of not guilty where there is no showing that the defendant was misled by anything said or done by the court or prosecuting attorney although the defendant was sentenced to pay a larger fine than he believed from statements made by a police officer would be imposed upon him.

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OPINION OF THE COURT BY QUARLES, J.

The defendant was arrested charged with conducting a bunco game in violation of section 4175 R. L. One of his attorneys saw the police officer making the arrest and told the officer that defendant did not have anything to do with the bunco game, whereupon the officer said that if the defendant would plead guilty to being present at a gambling game he (the police officer) would see that the defendant was fined \$25. The deputy city and county attorney, who had charge of the case, refused to agree with the arrangement or to make any agreement whatever. The charge of conducting a bunco game was dropped and a charge made against the defendant of knowingly and unlawfully permitting a gambling game to be carried on in certain premises rented and controlled by him contrary to section 4177 R. L. To this last charge the defendant pleaded guilty, one of his attorneys being present, and thereupon the district magistrate sentenced him to pay a fine of \$200. The defendant then moved to change his plea from that of guilty to that of not guilty, and in support of his motion introduced certain affidavits and witnesses, the substance of which is to the effect that owing to the said conversation between the police officer and the attorney for defendant, the defendant believed that he would not be fined more than \$25, and that when he entered his plea of guilty he understood that he was pleading to the charge of being present at a gambling game. There is no evidence tending to show that the district magistrate or the prosecuting attorney said or did anything to induce the belief on the part of the defendant that he would be shown any leniency by reason of entering a plea of guilty or that he would be fined any certain amount. The district magistrate denied the motion of the defendant to change his plea and from the order denying the motion the defendant has appealed directly to this court upon the point of law that the district court erred in denying the

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motion of defendant to withdraw the plea of guilty and enter a plea of not guilty.

Permitting a defendant to change the plea after sentence, where he has been misled by anything said or done by the trial court or by the prosecuting attorney resulting in his receiving a greater punishment than the court and prosecuting attorney led him to believe that he would receive, is sustained by some of the authorities (1 Bishop's New Criminal Procedure, Secs. 124, 747; *State v. Stephens*, 71 Mo. 535; *State v. Kring*, 71 Mo. 551; *Sanders v. State*, 85 Ind. 318; *Meyers v. State*, 115 Ind. 554; *City of Salina v. Cooper*, 45 Kans. 12; *Mounts v. Commonwealth*, 89 Ky. 274; *People v. Richmond*, 57 Mich. 399; *Cochrane v. State*, 6 Md. 400). In this jurisdiction the rule is established that an application to withdraw a plea of guilty and enter that of not guilty is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of abuse of discretion (*Territory v. Chamberlain*, 20 Haw. 103). It is not an abuse of discretion for the trial court, after a plea of guilty and sentence in a misdemeanor case, to refuse defendant's motion to change his plea from that of guilty to that of not guilty, where there is no showing that the defendant was misled by anything said or done by the court or prosecuting attorney, although the defendant was sentenced to pay a larger fine than he believed from statements made by a police officer would be imposed upon him.

The order of the district magistrate refusing to permit the defendant to withdraw his plea of guilty and enter a plea of not guilty is affirmed.

A. M. Brown, City and County Attorney, W. T. Carden, Second Deputy City and County Attorney, for the Territory.

L. L. Burr for defendant.

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FANNIE HART v. JAMES HART.

No. 991.

ERROR TO CIRCUIT JUDGE, FIFTH CIRCUIT.

HON. L. A. DICKEY, JUDGE.

ARGUED FEBRUARY 21, 1917.

DECIDED MARCH 13, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

DIVORCE—*alimony*.

The subsequent misconduct of a wife can be considered upon an application to modify an allowance of alimony, but where the facts disclose a single lapse from virtue, in the absence of other facts and circumstances showing a disposition to err on the part of the wife, such showing is insufficient to warrant the court in disallowing her all future alimony to which she would otherwise be entitled.

SAME—*modification of decree*.

Although in this Territory there is no express authority therefor a circuit judge has undoubted authority to alter or modify the decree respecting the award of alimony upon a proper showing.

SAME—*allowance for expenses and attorney's fees*.

The provisions of section 2935 R. L. are broad enough to include the allowance of expenses and attorney's fees incurred or to be incurred by a wife in resisting an application for an order revoking an allowance of alimony.

OPINION OF THE COURT BY COKE, J.

The record in this case shows that libellant and plaintiff in error, Fannie Hart, was granted an absolute divorce from the libellee and defendant in error, James Hart, by the circuit judge of the fifth circuit on the ground of cruelty. The decree was made and entered on June 28, 1916, and became effective from and after July 5, 1916. The plaintiff was also awarded permanent alimony in the sum of fifteen dollars per month, payment thereof to commence on the 10th day of July, 1916. There was no showing that either of the

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parties possessed any property and the decision of the court shows clearly that the allowance of alimony to the plaintiff was to come out of the future earnings of the defendant, which the court found amounted to about fifty dollars per month. Thereafter and on or about the 9th day of July, 1916, plaintiff was arrested and charged with having committed the offense of fornication with one Peahu, and on the 10th day of July, 1916, she plead guilty to the charge before the district magistrate of Waimea, County of Kauai. On July 13, 1916, defendant appeared before the judge of the fifth circuit with a motion to modify the former decree to the extent that defendant would thereafter be relieved from payment of an attorney's fee and future alimony to plaintiff. This motion was based upon the ground that plaintiff had committed fornication on July 9, 1916, and subsequent to the entry of the decree granting her a divorce and an allowance of alimony. Hearing was had on this motion and the same was granted to the extent that the defendant should not be required to pay plaintiff any further alimony, the court basing the order solely upon its finding that plaintiff had committed fornication on the occasion above referred to. From this order of the court below the plaintiff comes here on a writ of error assigning numerous errors alleged to have been committed by the court in respect to the hearing on defendant's motion to modify the original decree.

The principal error complained of by plaintiff reads as follows: "(1) That the circuit court erred in granting the motion of the libellant, James Hart, to modify the decree of divorce so as to revoke the payment of alimony on account of the subsequent misconduct of the libellant in that said libellant committed the offense of fornication." Fornication is a misdemeanor under the statutes of this Territory, punishable by fine not exceeding fifty dollars nor less than fifteen dollars, or by imprisonment not more than

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three months nor less than one month (Sec. 4148 R. L.). There is nothing in the record either showing or tending to show that the means or financial ability of the parties has changed since the entry of the original decree. The record in this case discloses that a single act of fornication was committed by the plaintiff, and while reprehensible in itself it does not indicate that plaintiff was leading a life of idleness or prostitution. If plaintiff, subsequent to the decree awarding alimony, was being kept by a paramour or had become a prostitute or was leading a life of vice it would be unconscionable and against public morals to compel the husband by his daily labor to support her. The wife owes it to society to lead an exemplary life. If she transgresses, even upon a single occasion as she did in this case, she merits prosecution and punishment.

Counsel for plaintiff relies largely upon the law as expressed by the courts in *Cole v. Cole*, 142 Ill. 19 and *Forrest v. Forrest*, 3 Bosworth (N. Y.) 661. In the latter case it was held in effect that there is no law by which the wife's subsequent misconduct, whatever it may be, can be punished by a forfeiture of part of an allowance, just in itself, when fixed and adjudged to her, by reason of her husband's violation of his legal duties to her. This rule, in our opinion, would encourage indolence and vice. Although recognizing its eminence we cannot yield to the authority of this case. We prefer to adopt the reasoning advanced in the very recent and well considered case of *Weber v. Weber*, 153 Wis. 132, wherein the court says: "If the wife, without the fault of the husband, and without adequate excuse or palliation, deliberately chooses a life of shame and dishonor * * * and the husband is compelled by his daily toil to earn the money paid to her, the court may make the misconduct of the wife the ground for cutting off all alimony, or for reducing the same as may in its sound discretion seem just and equitable under all the circumstances of the case." In

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the State of Wisconsin, as well as in this Territory, the statutes prescribe no ground upon which a judgment of alimony may be modified, and as the court says in the *Weber* case, "It wisely leaves that to the judgment of the court. The considerations that may legitimately influence such judgment are so varied and complex that legislative and judicial wisdom alike refrain from any attempt to enumerate them. This much, however, may be said: the courts of our State do not permit vice to flaunt its banner before them unchallenged. When it appears its nature and extent may be inquired into, and if justice so demands, it may be made the ground of equitable relief in the allowance of alimony." In the case just cited the wife was granted a divorce upon the ground of cruelty and inhuman treatment by her husband and she was awarded the sum of fifty dollars per month permanent alimony. Thereafter the husband secured an order to show cause why the provision of the decree relating to alimony should not be stricken out because of alleged misconduct on the part of the wife after the entry of the decree. Hearing was had and the court found that plaintiff had, after the entry of the decree, committed sexual intercourse and was a woman of bad character, and ordered that she be given the sum of six hundred dollars in lieu of all alimony. While the record before it must have been more or less incomplete the supreme court of Wisconsin, in affirming the action of the lower court, found that "the evidence was no doubt sufficient to satisfy the court that the wife evinced a permanent disposition to err."

We are of the opinion that the reasoning in the *Weber* case, applied to the case under consideration, would not justify the cutting off of all alimony to the wife solely upon the showing that upon one occasion subsequent to the decree granting her a divorce and permanent alimony she had committed the offense of fornication. We adopt the

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view that the subsequent misconduct of a wife can be considered upon an application to modify an allowance of alimony, but we hold that where the facts disclose a single lapse from virtue, in the absence of other facts and circumstances showing a disposition to err on the part of the wife, such showing is insufficient to warrant the court in disallowing her all future alimony to which she would otherwise be entitled.

Although in this Territory there is no express statutory authority therefor, a circuit judge has undoubted authority to alter or modify the decree respecting the award of alimony upon a proper showing. 2 Bishop on Marriage and Divorce, 6 ed., sec. 429; *Stevens v. Stevens*, 72 Pac. 1061; *Wheeler v. Wheeler*, 18 Ill. 39; *Olney v. Watts*, 3 N. E. 354. Application for such modification is ancillary to and dependent in its nature upon the main proceedings and is addressed to the sound judicial discretion of the court, and the inquiry is whether sufficient cause has intervened since the decree to authorize or require the court to change or entirely withdraw the allowance. In other words, in granting the application the court must base its action upon grounds which the law recognizes as sufficient therefor. We are of the opinion that sufficient grounds were not presented to the court to justify the withdrawal of the allowance.

The only other error assigned by plaintiff containing sufficient merit to warrant consideration by this court is embodied in her twelfth assignment of error which specifies as error the action of the court below in denying her motion for an order granting her a reasonable sum for costs and expenses and attorney's fees incurred and to be incurred on her appeal from or review of the decision or order of the court disallowing her further alimony. Section 2935 R. L. provides:

"Whenever it shall be made to appear to the judge after

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the filing of any libel, that the wife is under restraint or in destitute circumstances, the judge may pass such orders to secure her personal liberty and reasonable support, pending the libel, as law and justice may require, and may enforce such orders by summary process. The judge may also compel the husband to advance reasonable amounts for the compensation of witnesses and other reasonable expenses of trial to be incurred by the wife. The judge may revise and amend such orders from time to time."

The court in passing upon the motion of plaintiff for expense money and attorney's fees, denied the motion upon the theory that the statute above quoted does not authorize the court to grant expenses and attorney's fees in a proceeding of this kind, and upon the further ground that "the court believes its order of July 13, 1916, to be right and an appeal from that order not worth while." Neither of these reasons is sound. Undoubtedly the court thought its decision right, and this may be said of all courts whose decisions come here for review. But such an opinion on the part of the court is hardly a cogent reason for disallowing the motion or the proper exercise of its sound discretion in denying expense money and attorney's fees where a party might honestly deem himself aggrieved by the court's decision. As a matter of fact, the court found "that the appeal of libellant from the order entered July 13, 1916, is taken in good faith and that libellant has no funds with which to perfect said appeal or to prosecute it in the supreme court of the Territory, but that defendant has an income of at least \$45 per month."

We are of the opinion that the provisions of section 2935 R. L. are broad enough to include the allowance of expenses incurred or to be incurred by the wife in resisting an application for an order revoking an allowance of alimony contained in a decree granting her a divorce. It seems obvious to us that the wife might be as much in need of expense money in her efforts to protect the rights granted her by

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a final decree of divorce as she would be in need therefor in the proceedings had prior to said decree. "It could not have been contemplated that before judgment the wife should be aided in maintaining her rights, but after judgment in her favor should be left to starve during the pendency of an appeal and should be disarmed by her very success from defending the judgment in her favor." *McBride v. McBride*, 23 N. E. 1065; *O'Brien v. O'Brien*, 19 Neb. 584. In *Helden v. Helden*, 11 Wis. 558, a case particularly analogous to the one now under consideration, an appeal was taken from an order of the circuit court allowing two hundred dollars for attorney and counsel fees on the proceedings in an issue wherein the wife had been guilty of adultery, which issue was made up on a petition of the husband for the purpose of reducing the alimony after the original decree of divorce. The court found that under the laws of Wisconsin the matter of alimony might be further litigated after the divorce and the intent was to reserve to the court the same power to protect the wife in regard to the expenses of litigation which it had in the original action. Otherwise the husband might, by renewing litigation in respect to the alimony, compel the wife to exhaust her entire allowance without any power in the court to protect her.

We think that the circuit judge should have exercised his sound discretion in the matter of the application of plaintiff for expenses and attorney's fees. This he failed to do.

The order of the circuit judge made and entered on July 13, 1916, modifying the original decree so that defendant would not be required to make any further payments of alimony to plaintiff from that date is hereby reversed and set aside, and the order of the circuit judge made and entered on July 19, 1916, wherein he disallowed plaintiff's motion for costs and expenses and attorney's fees incurred

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or to be incurred in this proceeding is reversed and the cause is remanded to the circuit judge for further proceedings not inconsistent with this opinion.

Fred Patterson for plaintiff in error.

N. W. Aluli (*A. G. Kaulukou* with him on the brief) for defendant in error.

FRANK C. BERTELMANN, HENRY G. BERTELMANN, CHRISTIAN BERTELMANN, ANGELINE BERTELMANN MURASKY, HATTIE BERTELMANN BANNISTER, BEATRICE BERTELMANN ROSS, WILHELMINA BERTELMANN BAKER, AND MRS. HELEN M. COCKETT *v.* MRS. ELIZABETH KAIO, MRS. ELSIE COLLIN, STEPHEN L. DESHA, AND WALTER W. SCOTT, A MINOR, JANET M. SCOTT, A MINOR, AND RUBENA F. SCOTT, A MINOR, BY THEIR GUARDIAN AD LITEM, BISHOP TRUST COMPANY, LIMITED, AN HAWAIIAN CORPORATION.

No. 994.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 12, 1917.

DECIDED MARCH 17, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

APPEAL AND ERROR—*annulment of decree by writ of error—divorce.*

Where, in a divorce case, a decree is rendered granting the wife, as libellant, a divorce and alimony the defendant sues out a writ of error for the purpose of reviewing the said decree, but dies during its pendency in the supreme court, the decree is not annulled by the issuance of the writ of error, and the libellant therein

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is not the widow of the libellee notwithstanding she filed in the supreme court, after the death of the libellee, a confession of error, no judgment, order or mandate having been made in the supreme court reversing the decree of divorce.

OPINION OF THE COURT BY QUARLES, J.

The plaintiffs are the heirs at law of Susan Bertelmann Kahilina (hereinafter for convenience called Susan) who died September 2, 1915. Susan was formerly the wife of Isaac H. Kahilina (hereinafter for convenience called Isaac) who died November 18, 1902, leaving certain lands from which the defendants, as heirs, have been collecting rents since his death. Plaintiffs claim to have inherited from their said mother an interest in said lands which she, plaintiffs contend, inherited from Isaac as his lawful widow, and demand of defendants an accounting for such rents, to procure which the bill of complaint herein was filed. To the bill of complaint the defendants filed a plea in bar in which they allege that Susan was not the widow of said Isaac at his death as alleged in the complaint; that said Susan filed in the circuit court of the first judicial circuit of the Territory of Hawaii on the 14th day of February, 1902, her amended libel for divorce against said Isaac praying that the bonds of matrimony then existing between them be dissolved; that thereafter and on February 24, 1902, the said case was duly heard; and that on February 25, 1902, the said court did make and file its decree adjudging and decreeing that the bonds of matrimony theretofore existing between the said Susan and the said Isaac be dissolved and annulled and held for naught as shown by copy of the record, pleadings and decree in said divorce suit referred to and made a part of the plea in bar. To the plea in bar the plaintiffs filed a traverse in which it is admitted that the said libel for divorce was filed and the decree divorcing the parties was made and filed, but affirmatively alleging that the said Isaac sued out a writ of error on the 4th day of

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April, 1902, in the supreme court of Hawaii to review and reverse the said decree granting a divorce and granting alimony to Susan, the libellant therein; that thereafter and on May 13, 1903, Susan, as defendant in error in said divorce suit, filed a confession of error in the cause in the supreme court; that said writ of error was pending in the supreme court at the time of the death of said Isaac and was not disposed of until the filing of said confession of error by the said Susan. To the traverse the defendants filed a rejoinder in which they allege that one Samuel Kanewanui was duly appointed by the circuit court of the fifth judicial circuit as administrator of the estate of said Isaac on the 23d day of January, 1903, and immediately qualified as such administrator; admit the filing of the confession of error by the said Susan, but say that it was filed without notice to the said administrator of Isaac and that no notice thereof was given to the defendants; that after the death of said Isaac no suggestion of his death was made in the cause in the supreme court and no order reviving the cause in favor of the said personal representative was made therein, and no decree, mandate or order was made by the supreme court setting aside or reversing the decree of divorce, as shown by the records and proceedings in the said cause in the supreme court referred to and made a part of the rejoinder. There is no controversy as to the facts. The circuit judge sustained the plea in bar and made a decree dismissing the bill, from which the plaintiffs have appealed.

From the facts, briefly outlined above, it is contended by the plaintiffs, appellants, that by reason of the suing out of the writ of error (and the confession of error filed by Susan) the decree of divorce was of no effect at the time of the death of Isaac and that Susan was then his wife and as such inherited an interest in his said lands which have descended to the plaintiffs as heirs at law of Susan. Unless this contention is correct the decree of the circuit judge

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sustaining the plea in bar and dismissing the plaintiffs' bill of complaint must be affirmed.

Under Civil Laws of Hawaii 1897, Secs. 1445, 1446, 1456, a writ of error could be had for error of law or fact appearing on the record or for any error that might be assigned as error at common law; the record to be deemed to include all of the pleadings, motions, notes or bills of exceptions, exhibits, clerk's or magistrate's notes of proceedings, and, if desired by the plaintiff in error, a transcript of the evidence; the supreme court had power to enter such judgment in the case as in their opinion the facts and law warranted. The provisions of the Civil Laws 1897 are limited and restricted by those of Sec. 1447 wherein it is provided that "There shall be no reversal on error of any finding depending on the credibility of witnesses or the weight of the evidence." The power of this court to reverse the decree in an equity suit on the facts is broader where the case comes here on appeal than when it comes up on writ of error. Plaintiffs contend that as the supreme court had power to make such decree as the law and facts warranted the suing out of the writ of error practically amounted to granting a new trial and that there was no decree of divorce at the time of the death of Isaac. We are cited to the case of *Rishel v. Rishel*, 24 Pa. S. C. 303, and to the case of *McGrail v. McGrail*, 51 N. J. Eq. 537, as authority to the effect that an appellate court should carefully scrutinize the evidence in a divorce suit and either reverse, affirm or modify the decree of divorce in accord with the law and facts of the case. The rules announced in these decisions are correct. We are unable to agree to the proposition contended for by the plaintiffs and apparently supported by the decision in *Rosenfeld v. Stix*, 67 Mo. Ap. 582 (and two other Missouri Appeal decisions therein cited), that because of the writ of error, and the death of Isaac during its pendency, that Susan was his wife at the time of his death. We have no

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statute or judicial precedent in this jurisdiction to the effect that the issuance of a writ of error has any more effect in a divorce case than it has in any other case. The proposition was recently advanced in this court to the effect that where there is an appeal from a decree in an equity suit the cause comes here for a trial *de novo*, and that the defendant in error having died pending the writ of error this court should enter a decree dismissing the suit, but we held otherwise (*Wilder v. Pinkham*, ante p. 571). An appeal or writ of error, while it may suspend the operation of a judgment or decree appealed from, does not *ipso facto* abrogate such judgment or decree. The decree in the divorce case remained binding on the parties subject to a reversal thereof for error and was in force at the time of the death of Isaac. His personal representative might have been substituted in place of Isaac as plaintiff in error in the divorce case, and if this had been done such personal representative could undoubtedly, as his ancestor could have done in his lifetime, have discontinued the writ of error, thereby withdrawing all question as to the correctness of the decree of divorce. Since the transfer of jurisdiction in divorce cases from the circuit court to the circuit judge at chambers an appeal from a decree of divorce has the same effect as an appeal from a decree in equity (*de Coito v. de Coito*, 21 Haw. 339, 342). An appeal or writ of error does not, in the absence of statutory provision to that effect, vacate the judgment or decree appealed from (*Railway v. Twombly*, 100 U. S. 78, 81; *Miller v. Nuckolls*, 76 Ark. 485, 89 S. W. 88; *Barnes v. Chicago Typographical Union*, 14 L. R. A. N. S. 1150, 1154; *Fort v. Fort*, 101 S. W. (Tenn.) 433; *Nill v. Comparet*, 16 Ind. 107; *Cole's Adm'r. v. Conolly*, 16 Ala. 271; 3 C. J. p. 1261, Sec. 1373; 2 R. C. L. p. 117, Sec. 94). We have no statute in this jurisdiction which annuls a judgment or decree upon the taking of an appeal or writ of error, hence the decree of divorce remained in force subject to the action

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of the appellate court. The mere filing of a confession of error by Susan after the death of Isaac, without any action thereon by the appellate court, did not vacate the decree of divorce.

The plea in bar was properly sustained and the decree dismissing the bill of complaint is affirmed.

Andrews & Pittman for plaintiffs.

Alexander Lindsay, Jr., for defendants.

ANNIE GARVIE EVANS v. JAMES GARVIE AND
BISHOP TRUST COMPANY, LIMITED, TRUSTEE.

No. 989.

SUBMISSION WITHOUT ACTION.

SUBMITTED MARCH 15, 1917.

DECIDED MARCH 23, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

TRUSTS—corporations—apportionment of extraordinary dividends between life tenant and remainderman.

Where shares in a corporation are left in trust for the benefit of remaindermen, the annual income therefrom being payable to another, an extraordinary stock dividend declared upon accumulated earnings of the corporation which accrued partly before and partly after the institution of the trust should be apportioned between the respective interests, so much of the dividend as represents earnings which accrued after the creation of the trust, less any premium on the shares in the market immediately after the declaration of the dividend, being distributable to the person entitled to receive the income, the remainder belonging to the corpus.

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~~SAME—same—extraordinary dividend based on increased value of corporation's property.~~

A stock dividend upon shares held in trust which represents a natural increase in the value of land owned by the corporation is merely a change in the form of ownership and belongs to the corpus of the trust fund.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

This is a submission upon agreed facts in which it is made to appear that Annie Garvie, now Annie Garvie Evans, on January 8, 1909, being the owner of certain real estate and certain personal property, including twenty-eight shares of the capital stock of the Oahu Railway and Land Company and eighty-five shares of the capital stock of the Oahu Sugar Company, Limited, conveyed and transferred the same to the Bishop Trust Company, Limited, upon trust (subject to certain terms and conditions not material here) to hold and manage the same and to collect the income thereof and to pay the net annual income to her, the said Annie Garvie, until James Garvie, her son, shall attain the age of twenty-one years, and then to convey and deliver to the said James Garvie one-half of the property and to hold the remaining half in trust for the said Annie Garvie absolutely; that James Garvie is now of the age of sixteen years; that on July 1, 1912, the Oahu Railway and Land Company increased its capital stock from \$4,000,000 to \$5,000,000 by the issue of new shares to its stockholders as a stock dividend, whereby the trustee received seven additional shares of said stock; that on January 8, 1909, the railway company had a credit of undivided earnings in its profit and loss account of \$432,800.60; that on July 1, 1912, and immediately before the declaration of the stock dividend, the amount of undivided earnings of said company was \$783,436.36; also that at the time of the declaration of said stock dividend, and as an incident thereto, the valuation of the fee simple land of said company was increased, on the books of said company, in the amount of \$255,515.75,

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which said sum represents the increase in the value of the fee simple land from March 1, 1901, to July 1, 1912; that from said increase in the value of the land and in the amount of undivided earnings, aggregating \$1,038,952.11, the said stock dividend was declared, and the sum of \$38,952.11 was carried forward on the books of the company as undivided earnings after the declaration of the stock dividend; that the stock of the railway company is of the par value of \$100 per share; that on January 8, 1909, the stock was of the market value of \$115, while on June 30, 1912, the market value was \$170, and on July 1, 1912, upon the declaration of the stock dividend, the market value was \$136 per share. That on December 31, 1912, the Oahu Sugar Company increased its capital stock from \$3,600,000 to \$5,000,000, by the issue of new shares, whereby the trustee received thirty-three additional shares of said stock; that on January 8, 1909, the company had a credit of undivided earnings in its profit and loss account of \$985,000; that on December 31, 1912, immediately before the declaration of the stock dividend, the amount of undivided earnings of said company was \$1,745,000; that upon the declaration of the stock dividend of \$1,400,000, a credit of \$345,000 remained as a balance of undivided earnings in the profit and loss account; that the stock of the Oahu Sugar Company is of the par value of \$20 per share; and that on January 8, 1909, the stock was of the market value of \$28.12½, while on December 30, 1912, it was of the market value of \$40, and on December 31, 1912, upon the declaration of the stock dividend, it was of the market value of \$29.50 per share. A controversy has arisen as to the division of the shares derived from these stock dividends between Mrs. Evans and her son under the terms of the trust instrument.

On behalf of Mrs. Evans it is contended that she is entitled to all of the shares of the railway company's stock less only such proportion thereof as was represented by the

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proportional increase in the value of the fee simple land of the company from January 8, 1909 (the date of the institution of the trust), to July 1, 1912 (the date of the declaration of the stock dividend), and the premium value on the shares of stock on July 1, 1912, after the dividend was declared, and that she is entitled to all of the shares of the sugar company's stock less only the small proportion thereof as was represented by the premium value on the same on December 31, 1912, after the declaration of the stock dividend. It is urged that a stock dividend declared from accumulated earnings of a corporation after the creation of a trust is to be regarded as income; that no attempt should be made to apportion the dividends in question with reference to the time, before or after the date of the institution of the trust, when the earnings accrued, but that both the dividends, except a portion of that of the railway company which rested upon the increase in the value of land, should be treated as income distributable as of the dates on which the dividends were declared; and that so much of the dividend of the railway company as was represented by the increased value of its land immediately prior to January 8, 1909, which counsel would have determined by prorating the total amount of such increased value between the two periods from March 1, 1901, to January 8, 1909, and from the latter date to July 1, 1912, should also be regarded as income. Counsel for the guardian of the minor contends that these dividends should be apportioned between capital and income with reference to the time when the surplus earnings accrued; that such portion as had accumulated at the date of the institution of the trust should be regarded as belonging to the corpus of the trust estate and such only as accrued after that date can be treated as income; and that so much of the dividend of the railway company as represented an increase in land values belongs entirely to the corpus. Aside from the question of apportionment both

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counsel concede that as upon the declaration of the stock dividends the shares of each of the companies were at a premium on the market such proportion of the shares is to be considered as income as, had the dividends been declared in cash, could have been purchased at the market price.

In *Carter v. Crehore*, 12 Haw. 309, upon a careful examination of the several theories respecting the disposition of extraordinary dividends of corporations where the respective interests of life tenants and remaindermen are opposed, it was held that a stock dividend representing earnings which had accumulated after the creation of the trust should be regarded, up to the par value of the new stock, as income payable to the life tenant and that the balance representing the right to take the new stock at par, or the depreciation in the value of the old stock, should be held by the trustees as part of the corpus of the estate. We regard so much of the law on the subject as was applied in that case as settled in this jurisdiction. The further question is now presented in this case as to whether, where it is shown that the surplus income which has been appropriated by the corporation as against the new issue of shares, was earned partly before and partly after the institution of the trust should go entirely to the life tenant or be apportioned between the life tenant and the remainderman.

"The Pennsylvania rule holds, with the later English rule, that earnings are not income to the shareholder until so appropriated by the corporation, but does not go to the extent of that rule in holding that such appropriation when made is conclusive as between the life tenant and remainderman or that the testator must have intended that the mere way in which the corporation appropriated earnings, should determine whether they should go to the life tenant or remainderman; and holds on the other hand, with the early English rule, that the testator must have regarded the accumulations of earnings at the time of his death as capital to be held for the remainderman, but does not go

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to the extent of that rule in holding that it is impracticable to ascertain what was earned before and what after his death. Accordingly the Pennsylvania rule when an extraordinary dividend is declared, whether in cash or stock, apportions it, giving to the life tenant what was earned during the life tenancy and holding for the remainderman what was earned before the life tenancy began." 12 Haw. 319.

"The three courts which follow the rule of apportionment have found great difficulty in applying it and a different method of ascertaining how the apportionment should be made has been adopted by each. This rule is open to grave objections, both theoretical and practical, but we need not express an opinion as to whether they are more weighty than the objections made to the rule of non-apportionment, for in the present case it appears that the profits out of which the dividend was declared were earned during the life tenancy, and therefore whether the rule of apportionment or that of non-apportionment should be followed the dividend so far as it represented earnings would all go to the life tenants." Id. 320.

Nevertheless the opinion in that case shows that where a stock dividend represents partly a natural increase in the value of the corporation's property and partly accumulated profits an apportionment becomes necessary. And it was held in that case that an apportionment was required to prevent a depreciation of the corpus by reason of the shares being at a premium after the declaration of the stock dividend. 12 Haw. 326. That the troublesomeness of the subject of the distribution of extraordinary dividends upon corporate stock held in trust, which was noted in *Carter v. Crehore*, has not abated is shown by the notes in 12 Ann. Cas. 650, 23 id. 1218, 35 id. 311, 12 L. R. A. N. S. 768, and 50 id. 510.

At bottom it is a matter of determining the intention of the creator of the trust. In the trust instrument in hand extraordinary dividends are not mentioned, but it is a natural inference that it was the intention that the integrity of the corpus should be preserved for the benefit of

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the remaindermen while all income to accrue therefrom should be paid to the person entitled to it—in this case, the donor herself. We think it a further natural inference that surplus earnings already accumulated and which should not be paid out as ordinary cash dividends were regarded as of the corpus. The intent that the apportionment of extraordinary dividends should be made is, we believe, fairly inferable from a general direction to a trustee, such as we have here, to hold and manage the property, to collect the income thereof and to pay the net annual income to a designated person. Such intent should be effectuated if possible. The common law rule against the apportionment of moneys applies to such as are payable periodically or at fixed times, and may be extended to ordinary dividends of corporations though not declared at regular intervals, but no good reason requires that it be applied to extraordinary dividends. The great difficulty said to be involved in ascertaining the time when and source from which surplus profits have accrued, and in making an equitable apportionment between the respective interests, which seems to be the basis of the arbitrary rule against making an apportionment, seems to us not to furnish a satisfactory reason for the rule. Courts are not unaccustomed to deal with complicated questions of fact. Possibly the supposed difficulty has been overestimated. It may not infrequently happen that the facts, so far from being difficult to ascertain, will be clear and undisputed so that the parties will not be under the necessity of appealing to a court. In the case at bar the facts are agreed upon. Such was the case also in *In re Tod*, 147 N. Y. S. 161. In the case of *Matter of Osborne*, 209 N. Y. 450, the facts were undisputed. And in a number of Pennsylvania and New Jersey cases which we have examined there seems not to have been much difficulty in establishing the facts. Should a case arise in which it is impossible to ascer-

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tain the facts it may have to be decided upon presumptions, and if there should be complications which render the rule of apportionment difficult of application doubtless some way of approximating an equitable division will be devised by the court. Where, as here, the material facts have been agreed upon, and it is not contended that there are not sufficient facts before the court to enable it to make a fair apportionment of the dividends nothing but a fixed rule against making an apportionment in any case, which seems to be generally conceded to be a rule marked by simplicity rather than by fairness, can stand in the way of making an apportionment. The Pennsylvania rule commends itself to our sense of justice. It seeks and tends to obtain for the respective parties just what it is reasonably presumed the creator of the trust intended them to have. This rule has recently been espoused by the court of appeals of New York in *Matter of Osborne, supra*. In that case the court said,

"Notwithstanding the difficulty in many cases of apportioning dividends, it is wiser and better to leave an apportionment to courts of equity, in preference to adhering to a rule that depends more upon its simplicity and convenience of enforcement than upon justice and right. The distinction between ordinary and extraordinary dividends is necessary to make a workable rule and at the same time preserve the integrity of the trust fund. The integrity of the trust fund and rights of the life beneficiary under the trust should each be considered, determined and preserved by a court of equity." And held that "Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund." 209 N. Y. 477.

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We find no merit whatever in the contention of counsel for Mrs. Evans that so much of the stock dividend of the railway company as represented the natural increase in the value of land at the date of the trust instrument should be regarded as income. One would suppose that if the amount of the increased value could be apportioned at all such portion would go to the life tenant as accrued after the creation of the trust. But it is well settled that a stock dividend which represents the natural increase in the value of the permanent property of a corporation is merely a change in the form of ownership and belongs to the corpus of the trust fund. *Carter v. Crehore, supra*; *Estate of Cummins*, 16 Haw. 185, 192; *Kalbach v. Clark*, 133 Ia. 215; *Hite v. Hite*, 93 Ky. 257, 267; *Holbrook v. Holbrook*, 74 N. H. 201, 204.

We hold that the dividends should be apportioned in accordance with the foregoing views. Of the seven shares of the Oahu Railway and Land Company stock, Mrs. Evans is entitled to receive as income 1.805 shares as representing the proportion which the amount of earnings appropriated to capital accruing after January 8, 1909, (\$350,635.76) bears to the total dividend (\$1,000,000) as affected by the premium on the stock in the market (\$36) immediately after the declaration of the dividend. Of the thirty-three shares of the Oahu Sugar Company stock, Mrs. Evans is entitled to receive as income 12.08 shares as representing the proportion which the amount of earnings appropriated to capital accruing after January 8, 1909, (\$760,000) bears to the total dividend (\$1,400,000) as affected by the premium on the stock in the market (\$9.50) immediately after the declaration of the dividend. The remaining shares, 5.195 of the Oahu Railway and Land Company and 20.92 of the Oahu Sugar Company, will be held by the trustee as belonging to the corpus of the trust estate.

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A judgment in favor of Mrs. Evans against the trustee in accordance with this opinion may be entered.

W. B. Lymer for Mrs. Evans.

W. L. Stanley for the guardian of the minor.

H. TSUNODA *v.* YOUNG SUN KOW.

No. 984.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 1, 1917.

DECIDED MARCH 29, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

LANDLORD AND TENANT—*lease—construction.*

A lease, like any other contract, is to be construed so as to give effect to the intention of the parties and to every part of the instrument if possible, especially to conditions expressed therein.

SAME—*same—words and phrases.*

No particular form of words is necessary to constitute a lease. Any language which shows the intention of the parties that the lessor will surrender his property and the lessee will take it for a specified term and upon stated conditions is sufficient.

SAME—*same—appurtenances.*

A lease demised to the defendant four parcels of land on one of which was an artesian well; in the premises of the lease nothing was said about the privileges and appurtenances, while the habendum read "To have and to hold" with all "privileges and appurtenances," followed by a stipulation that the defendant should have the right to use as much of the water from such well as should be necessary for the proper irrigation of the lands demised to him, it being shown that one-third of the water from

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the well is and for three years last past had been sufficient for the proper irrigation of the lands demised to the defendant and that the surplus (two-thirds) of the water from the well had been used in the necessary irrigation of adjacent lands: Held, that such surplus water was excluded from the operation of the lease to the defendant and did not pass to him as an incident necessary to the use of the lands demised.

OPINION OF THE COURT BY QUARLES, J.

(Robertson, C.J., dissenting.)

The plaintiff, appellant, filed his bill of complaint October 14, 1916, praying that the defendant show cause why he should not be enjoined and restrained from diverting certain waters from the lands of the plaintiff; that a temporary injunction issue; and that on final hearing the injunction be made perpetual. It is alleged in the bill of complaint that the Chinese Y. M. C. A., a domestic corporation, owns four certain tracts of land therein described containing 3.88 acres, upon one of which is an artesian well flowing 170,000 gallons of water every twenty-four hours; that said corporation on June 13, 1916, leased to the defendant for a term of five years commencing July 1, 1916, the said four tracts of land together with so much water from said artesian well as should be necessary for the purpose of irrigating the said lands so demised to the defendant and for his domestic purposes; that said corporation did, September 21, 1916, lease to the plaintiff's assignor all the water flowing from said well except such as should be necessary for the irrigation of the lands demised to the defendant and for his domestic purposes at an annual rental of \$65 per year; that plaintiff is a sugar planter and possessed of eight acres of land adjacent to the said lands demised to the defendant, upon six acres of which he has growing cane fourteen months old, the other two acres being prepared and ready to plant to cane; that for

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APPEAL FROM CIRCUIT

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LANDLORD AND TENANT—*lease—c*

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erected by him and crops grown by him and to keep the premises in repair and comply with regulations of the board of health; to not make or suffer waste or unlawful use of the premises; to not assign the lease nor underlet the premises without the written consent of the lessor; to continuously cultivate the said lands in taro or other crop suitable to be raised on the premises; to keep the well clear of weeds and in good repair and condition; to not sell or permit water to be taken from said artesian well without the written consent of the lessor; to quietly surrender the premises at the end of his term. Then follows the stipulation: "IT IS HEREBY MUTUALLY AGREED by the parties herein, that the said lessee have the right to use as much water of the said artesian well on the lands hereby demised as shall be necessary for the purpose of irrigating the lands and for domestic purposes." Upon the filing of the bill of complaint summons, containing an order requiring the defendant to appear and show cause why a temporary injunction should not be granted restraining him from interfering with the use by plaintiff of the water claimed by him from said well, issued and was served upon the defendant. To the order to show cause the defendant appeared and filed a response, signed and sworn to by him, in which he claimed the right under his lease "to use as much water from the artesian well on the lands demised by the said lease as may or shall be necessary for the purpose of irrigating the said lands and for domestic purposes." In the return it is alleged: "That the rights of the plaintiff to any water from said well are subject to the prior right of the respondent herein as hereinabove set forth and more particularly appears by the written indenture of lease dated September 21, 1916, a copy of which is attached to plaintiff's bill of complaint, marked exhibit 'Z' which is referred to and made a part hereof." The defendant then claimed in his return that all of the water flowing from the said

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proportional increase in the value of the fee simple land of the company from January 8, 1909 (the date of the institution of the trust), to July 1, 1912 (the date of the declaration of the stock dividend), and the premium value on the shares of stock on July 1, 1912, after the dividend was declared, and that she is entitled to all of the shares of the sugar company's stock less only the small proportion thereof as was represented by the premium value on the same on December 31, 1912, after the declaration of the stock dividend. It is urged that a stock dividend declared from accumulated earnings of a corporation after the creation of a trust is to be regarded as income; that no attempt should be made to apportion the dividends in question with reference to the time, before or after the date of the institution of the trust, when the earnings accrued, but that both the dividends, except a portion of that of the railway company which rested upon the increase in the value of land, should be treated as income distributable as of the dates on which the dividends were declared; and that so much of the dividend of the railway company as was represented by the increased value of its land immediately prior to January 8, 1909, which counsel would have determined by prorating the total amount of such increased value between the two periods from March 1, 1901, to January 8, 1909, and from the latter date to July 1, 1912, should also be regarded as income. Counsel for the guardian of the minor contends that these dividends should be apportioned between capital and income with reference to the time when the surplus earnings accrued; that such portion as had accumulated at the date of the institution of the trust should be regarded as belonging to the corpus of the trust estate and such only as accrued after that date can be treated as income; and that so much of the dividend of the railway company as represented an increase in land values belongs entirely to the corpus. Aside from the question of apportionment both

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counsel concede that as upon the declaration of the stock dividends the shares of each of the companies were at a premium on the market such proportion of the shares is to be considered as income as, had the dividends been declared in cash, could have been purchased at the market price.

In *Carter v. Crehore*, 12 Haw. 309, upon a careful examination of the several theories respecting the disposition of extraordinary dividends of corporations where the respective interests of life tenants and remaindermen are opposed, it was held that a stock dividend representing earnings which had accumulated after the creation of the trust should be regarded, up to the par value of the new stock, as income payable to the life tenant and that the balance representing the right to take the new stock at par, or the depreciation in the value of the old stock, should be held by the trustees as part of the corpus of the estate. We regard so much of the law on the subject as was applied in that case as settled in this jurisdiction. The further question is now presented in this case as to whether, where it is shown that the surplus income which has been appropriated by the corporation as against the new issue of shares, was earned partly before and partly after the institution of the trust should go entirely to the life tenant or be apportioned between the life tenant and the remainderman.

"The Pennsylvania rule holds, with the later English rule, that earnings are not income to the shareholder until so appropriated by the corporation, but does not go to the extent of that rule in holding that such appropriation when made is conclusive as between the life tenant and remainderman or that the testator must have intended that the mere way in which the corporation appropriated earnings, should determine whether they should go to the life tenant or remainderman; and holds on the other hand, with the early English rule, that the testator must have regarded the accumulations of earnings at the time of his death as capital to be held for the remainderman, but does not go

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apparent from the language used by the parties in the lease and by conditions existing on the ground. In the lease to the defendant we find the recital that "the said demised premises being the same now occupied and cultivated by the lessee herein." It is alleged in the bill of complaint that the plaintiff had been using two-thirds of the water from the well for the irrigation of his land for three years prior to the filing of the bill and that one-third of the water from said artesian well had been for three years prior thereto and now is more than sufficient for the proper irrigation of the lands demised to the defendant and for his domestic purposes. The demurrer to the bill admits every material allegation therein. It thus appears from the allegations of the bill and from the exhibits annexed thereto and made parts thereof that plaintiff and defendant had been using the water flowing from the well—the former about two-thirds and the latter about one-third thereof—prior to the execution of the lease to the defendant, and that such proportion of the water was sufficient for each and necessary for the irrigation of the lands of each. While the plaintiff obtains no interest from the lease to the defendant and is not a party thereto he is interested in a proper construction of that lease. The recitals in the lease to the defendant, and the prior existing conditions on the land, presumably known to him, are of importance as tending to show what was in the mind of the parties, lessor and lessee, when the defendant's lease was executed. When these conditions are known it is an easy matter to determine how much of the water from the well was intended to pass to defendant and that the intent of the parties that only so much of it should pass as might be necessary for the proper irrigation of the lands demised to the defendant and for his domestic purposes seems clear. To hold that this express stipulation in the lease, because not found in the premises or in the habendum, is mere surplusage and must

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be disregarded or stricken out of the lease would be to make a contract for the parties other than the one which they have made for themselves. This the court is not authorized to do. Suppose the well flowed enough water to irrigate one thousand acres of land, would it be contended that all of the water passed to the defendant under his lease? If the contention of the defendant here is upheld we would also have to uphold the same contention notwithstanding that a thousand acres of land were being irrigated and had been irrigated for three years prior to the execution of the lease by said artesian well instead of the six acres irrigated by the plaintiff. In addition to the conditions existing on the land mentioned and the expressed stipulation of the parties, affirmatively stated, that defendant was to use as much water from the well as should be necessary to the proper irrigation of the lands demised to him and for his domestic purposes, the defendant expressly covenanted in the said lease that he would not make or suffer waste or unlawful use of the demised premises and "That he will not sell or permit water to be taken away by any person from said artesian well, by pipe or otherwise, without the consent in writing of the lessor, its successors or assigns." The lessor could have sold the right to take all of the water from the said artesian well prior to making the lease to the defendant, the use of such water being assignable by deed or lease (40 Cyc. 740). This being true he could certainly except from the operation of the lease such water or any portion of it. But was all of the water of the artesian well demised to the defendant, the intent of the lessor and lessee to the contrary notwithstanding, by the term "appurtenances" found in the habendum of the lease to the defendant? An appurtenant to land is something incidental to it and necessary to its use and enjoyment. *Simmons v. Cloonan*, 81 N. Y. 557. Under the term "appurtenances" in the deed or lease only such rights

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or privileges as are necessary to the land pass. "A thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter" (*Humphreys v. McKissock*, 140 U. S. 304, 313, 314). See also *Harris v. Elliott*, 10 Pet. 25, 54; *Jackson v. Hathaway*, 15 Johns. 447, 455; *Linthicum v. Ray*, 9 Wall. 241. The water that had theretofore been used on the lands demised to the defendant and was then being used on them and necessary for their use passed by the term "appurtenances" as well as by the expressed stipulation of the parties in the lease, but the water from the well theretofore used on the other lands for irrigation and then being used on such other lands and necessary for their cultivation did not pass by the term "appurtenances" in the lease or as appurtenant to the lands demised to the defendant, and, as we have endeavored to show, was excepted from the operation of the lease.

It is said, however, that the right to use water from a flowing stream on the land of another is an easement and that easements are matters of reservation and not of exception in a lease. "An easement is a liberty, privilege, or advantage without profit which the owner of one parcel of land may have in the lands of another" (14 Cyc. 1139). The exception of the water from the well not necessary for or used in the irrigation of the lands demised to the defendant was not the reservation of an easement; it could not be such in the very nature of things. Here the lessor demised certain lands with their privileges and appurtenances and the parties expressly agreed that so much of the water as flowed from a certain artesian well on one of the four parcels demised "as may or shall be necessary for the proper irrigation of the lands demised" should be used by the lessee. This did not grant to the lessee during his term the use of all of the water from said artesian well, and that

Coke, J., concurring.

portion thereof which did not pass by the lease to the defendant was retained by the lessor and it was not necessary to make an express reservation or exception of it in the lease. Under the allegations of the bill, the truth of which were admitted by the demurrer, one-third of the water flowing from the well was sufficient to properly irrigate the lands demised to the defendant and supply him with water for domestic purposes, while the remainder of said water was leased to the plaintiff by the mutual lessor of the parties to this suit and such surplus water was necessary for the irrigation of plaintiff's growing crops. There was, under the circumstances alleged in the bill of complaint and the conditions existing on the land, shown in the bill of complaint and known to both lessor and lessee, an implied reservation of an easement of the right of way through the ditch used by both plaintiff and defendant at the time of and prior to the execution of the lease to the defendant as was necessary to convey the water used by the plaintiff. The bill stated facts sufficient to entitle the plaintiff to the relief sought by him, contains equity, and the demurrer should have been overruled.

The decree dismissing the bill of complaint is reversed and the cause is remanded to the circuit judge with instructions to overrule the demurrer of the defendant to the bill of complaint and for further proceedings consistent with the views herein expressed.

C. F. Peterson for plaintiff.

Lorin Andrews (*E. A. Douthitt* on the brief) for defendant.

CONCURRING OPINION OF COKE, J.

I concur in the opinion of Mr. Justice Quarles to the effect that the decree dismissing the bill of complaint should be reversed. I do not understand that the opinion

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goes to the extent of holding that the surplus water from an artesian well does not belong to the land on which the well is situated or that upon a conveyance of the land that all the water, in the absence of an exception or reservation of a part thereof, would not pass to the grantee. It appears to me that in the lease between the Chinese Y. M. C. A. and the respondent the water, over and above what was reasonably necessary for the purpose of irrigating the lands demised to respondent and for his domestic purposes, was excepted from the operation of the lease and remained with the landlord. The provision in the lease that the lessee was to have the right to use as much of the water of the artesian well as was necessary for irrigation and domestic purposes was in effect a limitation upon the amount of water to which he was entitled. I am convinced from a study of the lease and the other records before us that this was the clear intent and understanding of the parties at the time the lease in question was executed.

DISSENTING OPINION OF ROBERTSON, C.J.

I am unable to concur either in the view that an intent to except the surplus water from the operation of the lease is inferable from the language used in the lease though it be read in the light of the surrounding circumstances, or in the view that the surplus water, at the time the lease to the defendant was executed, did not belong to or go with the land on which the well was situated.

An exception in a deed or lease withholds from its operation some part or parcel of the premises which, but for the exception, would pass by the general description. A reservation is the creation of some new right issuing out of the premises, and which did not exist before as an independent right, in behalf of the grantor or lessor. *Pilipo v. Scott*, 21 Haw. 609. A right in or to running water upon

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the land of another, as distinguished from a right to take water from a surface well or cistern, is an easement. 14 Cyc. 1143; *Amidon v. Harris*, 113 Mass. 59; *Hill v. Lord*, 48 Me. 83, 99; *Borst v. Empie*, 5 N. Y. 33. Here, it would be a right issuing out of the premises which prior to the lease did not exist as a right independent of the title to the land, and, therefore, would be the proper subject, not of an exception, but of a reservation. *Sheffield W. Co. v. Elk T. Co.*, 225 Pa. St. 614, 619. The question is whether a reservation of the right to the water over and above what is required for irrigation and domestic purposes on the demised premises can be implied or inferred. Technical words are not necessary to create a reservation of an easement. It may arise out of a covenant in a lease. But in order to effectuate an apparent intention of the parties to a lease to make a reservation the language used by them must be reasonably susceptible of the required interpretation. Reservations by implication or inference are not favored. If the language of a lease is doubtful or ambiguous as to what was intended to be demised it should be construed against the lessor. 18 A. & E. Enc. Law (2d ed.) 617; *Coney v. Dowsett*, 3 Haw. 740. See also *Wells v. Garbutt*, 132 N. Y. 430, 435, where the court said, "As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases." "If there is a reasonable doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be construed favorably for the lessee, and against the lessor." 1 Taylor L. & T. (8th ed.) Sec. 158. The defendant's lease demised to him the land in question (excepting "a small lot near the stream") together with all the "rights, ease-

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ments, privileges and appurtenances" belonging thereto. It will be observed that the clause in the lease upon which the complainant bases his claim, namely, "that the said lessee have the right to use as much water of the artesian well on the lands hereby demised as shall be necessary for the purpose of irrigating the said lands and for domestic purposes," is not inconsistent with, and does not in terms derogate from the express general words of demise. Upon the principle that the greater includes the less that clause neither added to nor subtracted from the general terms, and should, therefore, be treated as surplusage. But counsel for the complainant contends, and the majority of the court evidently find, that from the affirmative language of the clause in question the negative provision is to be inferred, that the lessee shall not have or use any more water than is necessary for the irrigation of the demised lands and for his domestic purposes, and that from such inference the intent to except the surplus water should be found. And these inferences are raised, be it noted, not against the lessor, but in his favor. But the language of the lease is clear and unambiguous. It demised to the defendant the lands with all the rights, privileges and appurtenances belonging thereto. A reservation of the right to the surplus water in question might perhaps have been held to be reserved by implication as appurtenant to the adjoining land upon which the water was being used at the time of the execution of the lease if the lessor had owned it. See 14 Cyc. 1171, 1172; 9 R. C. L. 757. But it is not averred in the bill that the land occupied by the complainant, and upon which the water was used, belonged to the Chinese Y. M. C. A. The fact that the well supplies more water than can be used on the premises demised to the defendant would lead one naturally to expect that some provision making disposition of the surplus would be found in the lease. There is nothing more than a covenant on the part

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of the lessee that "he will not sell or permit water to be taken away by any person from said artesian well, by pipe or otherwise, without the consent in writing of the lessor, its successors or assigns." But it would seem to be more reasonable, and more in accord with the rules of construction, if they had to be invoked, to infer from that covenant that the parties contemplated that the surplus water would be disposed of under some mutual arrangement of the parties, than to infer from the other clause that the lessor reserved to itself an easement in gross in the demised premises. It is neither averred nor argued that the surplus water was reserved as an appurtenance to the piece of land expressly excepted in the lease.

It is said in the principal opinion that "In case of conflict between the premises of a deed and the habendum the former controls." But there is no conflict between the premises and habendum of the defendant's lease. Taylor is quoted to the effect that "conditions and limitations are not to be raised by mere inference." Yet the majority raise the inference that the lessee was not to have or use more than a certain quantity of water and from that inference infer an intent to except from the operation of the lease the rest of the water. The rule *expressio unius est exclusio alterius* is invoked, but the application of that rule, in view of the fact that there is an express exception in the lease of a piece of land, would prevent the inferring of an exception of the surplus water. The question is put whether, if the well flowed enough water to irrigate one thousand acres of land, it would be contended that all of the water passed under the lease. On the other hand it might be asked whether, if the surplus water was sufficient to irrigate only a square yard of land, it would be contended that there was an intent on the part of the lessor to reserve to itself an easement to the extent of such surplus. But the putting of extreme illustrations does not help to solve the problem. The fact

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that in his return to the order to show cause why a temporary injunction should not issue the defendant did not claim all that he could have claimed under his lease would not preclude him from asserting a larger or further claim under his demurrer to the bill.

That the surplus water did not belong to the land on which the well is situated and did not pass by the demise of the land because not mentioned in the lease seems to be the position taken in the latter part of the prevailing opinion. No such contention was advanced by counsel for the complainant. The right to take water from a flowing well or stream may be separated by the owner from the title to the land by grant or reservation, and upon such separation the right to the water would become an easement in the land. But until a severance of the title, the water, in the nature of things, is part and parcel of the land, and would pass to a grantee or lessee without its being mentioned in the conveyance. See 3 Farnham on Waters, Sec. 722. It is immaterial whether or not the water was being put to a beneficial use. No distinction is to be drawn between water flowing from a natural spring and such as flows from an artesian well. *De Wolfskill v. Smith*, 5 Cal. App. 175, 181. An artesian well on land conveyed without reservation passes as part of the land. *Reid v. Reid*. 112 Cal. 274, 277.

It is my opinion that the right to all of the water of the well passed by the demise of the land to the defendant; that the complainant's assignor took no interest in or right to the water under the so-called lease of September 21; that there is no equity in the bill; and that the decree should be affirmed.

Syllabus.

HILO MEAT COMPANY, LIMITED, AN HAWAIIAN CORPORATION v. AUGUST ANTONE, AND CHARLES R. FORBES, SUPERINTENDENT OF PUBLIC WORKS.

No. 988.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED MARCH 6, 1917.

DECIDED MARCH 30, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

STATUTES—*municipal corporations—ordinances.*

The Territory will not be presumed to have waived its right to regulate its own property by ceding to the several counties within the Territory the right generally to pass ordinances of a police nature regulating property within their limits.

OPINION OF THE COURT BY COKE, J.

(Quarles, J., dissenting.)

The plaintiff, the Hilo Meat Company, Limited, a Hawaiian corporation, brought a bill for an injunction against the defendants August Antone and Charles R. Forbes, superintendent of public works of the Territory of Hawaii, to enjoin the defendants from carrying out the terms of a contract between them whereby the said August Antone was to erect for the Territory of Hawaii an addition to the territorial armory building within the city of Hilo, such addition to be a two-story wooden frame extension approximately 60 x 30 feet and to be built adjacent to and at the makai end of the present armory building. A temporary restraining order against the defendants was issued by the court which is still in effect. The defendants filed an answer to the bill of complaint and thereafter plaintiff and defend-

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ants entered into and filed an agreed statement of facts. From the records before us it appears that the plaintiff, the Hilo Meat Company, Limited, is a Hawaiian corporation; that the defendant August Antone is a contractor residing at Hilo, County of Hawaii; and the defendant Charles R. Forbes is superintendent of the department of public works for the Territory of Hawaii. The board of supervisors of the County of Hawaii, in pursuance of and within the authority granted by the laws of the Territory of Hawaii, duly enacted and passed certain ordinances, printed copies of which are attached to the agreed statement of facts. These ordinances created certain fire limits or districts within the city of Hilo, and provide "that in district No. 1 the exterior walls of any building erected in the said district shall be either of masonry, corrugated iron, or of noncombustible material." And further provide that "No person or persons or corporation shall erect, repair, change, alter, remove or re-roof any building or structure or excavate any cellar or lot for building purposes within the general fire limits unless he or they shall first obtain a permit for the work from the building inspector of the city of Hilo. And further that "No building shall be erected within the boundaries of district No. 1 of the general fire limits unless said building shall conform in all respects with the requirements of either a first or second class building." The property of the plaintiff and the property of the Territory of Hawaii upon which the defendants were intending to erect the armory addition is located within district No. 1 of the general fire limits of the city of Hilo; that the specifications which are made a part of the contract between defendants provide that "the exterior walls of the additions shall be of single board construction;" that this character of exterior walls of the building is in violation of the terms of the ordinances of the County of Hawaii; that under the authority of the ordinances herein referred to William Vannatta of Hilo, Hawaii, was ap-

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pointed building inspector under said ordinances and was and is acting as such building inspector; that the said building inspector was requested by the defendant August Antone to issue a permit for the work to be performed under said building contract made between the defendants, but the said building inspector refused to issue the permit therefor, assigning as reason for such refusal his opinion that the plans and specifications did not comply with the requirements of the ordinances of the board of supervisors herein referred to; that defendant Antone commenced work under his contract and intended to complete said building without a permit therefor from the building inspector, and that no permit has ever been issued by the said building inspector for the work contemplated under said contract; that unless defendants are restrained they will erect said addition without procuring a permit therefor from said building inspector; that the plaintiff is the owner of the land and a one-story frame metal roof building situated thereon and adjacent to the armory premises of the value of \$5000, and the plaintiff carries insurance on said building in the sum of \$3000; that the present armory building is fifty-three feet distant from the said property of plaintiff; but that if said addition as contemplated is erected the building will then be within twenty-three feet of the property of plaintiff and that the erection of the addition to the armory as provided in the contract between the defendants herein will increase the danger from fire to the property of plaintiff and that it will increase the insurance rate on plaintiff's building to not less than seventy cents per hundred.

The case comes here upon reserved questions of law which present for this court to determine whether the ordinances of the board of supervisors of the County of Hawaii are binding upon the Territory of Hawaii or upon one of the officials of the Territory acting in its behalf in his

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official capacity. Section 56 of the Organic Act authorizes the legislature to create counties, town and city municipalities within the Territory and to provide for the government thereof. Under this authority the legislature of the Territory of Hawaii conferred upon the board of supervisors of the several counties of the Territory authority "to regulate by ordinance the limits within which wooden and other inflammable buildings and structures shall not be erected, placed or maintained, which limits, when once established, shall not be changed except by extension; and to regulate also by ordinance, as to location, methods and materials of construction and otherwise, the erection, moving, repairing, placing or maintenance of buildings and other structures within or without such limits, so far as may be necessary or proper for the protection and safeguarding of life, health and property, and to fix penalties for violations of such ordinances." Subsection 6 of section 1554 R. L. "The superintendent of public works shall be, and hereby is, charged with the superintendence and management of the internal improvements of the Territory." Sec. 653 R. L.

It is obvious that the section last quoted delegates to the superintendent of public works authority to act in behalf of the Territory in the class of work provided for in the contract above referred to between the defendants herein.

Counsel for plaintiff urges that the ordinances of the County of Hawaii herein referred to are binding with equal force upon the Territory of Hawaii and its officials in the exercise of their duties as they are upon individuals, and in support of this contention relies largely upon the principles of law contained in the case of *Pasadena School District v. City of Pasadena*, 166 Cal. 7, 134 Pac. 985. In that case the Pasadena school district attempted to resist an ordinance of the city requiring that plans and specifications of proposed buildings be submitted to the city building

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inspector and his permit for the erection thereof be first obtained and the requisite fee paid. The court held the city to be a municipal corporation, and the school district to be a quasi municipal corporation, each being a political governmental agency and both distinct corporate entities; that the corporate powers of the school district are the most limited known to the law. The constitution of the State of California confers upon every city power to make and enforce within its limits all such local police and other regulations as are not in conflict with general laws. It seems obvious that under this constitutional provision the city of Pasadena would have authority in the absence of any general law on the subject to enforce its ordinance in respect to the construction of school buildings within the city limits, whether constructed by the trustees of the school district or by individuals. The case before us presents an entirely different situation. Here a political subdivision of the Territory of Hawaii, to wit, the County of Hawaii, is endeavoring to enforce its ordinances against the very authority giving it life and existence. The act of the legislature of the Territory of Hawaii conferring authority upon the County of Hawaii to pass ordinances does not expressly or otherwise provide that the parent government, to wit, the Territory of Hawaii, shall be bound thereby.

"It is said that laws are supposed to be made for the subjects or citizens of the State, not for the sovereign power. Hence, if the government is not expressly referred to in a given statute, it is presumed that it was not intended to be affected thereby, and this presumption, in any case where the rights or interests of the State would be involved, can be overcome only by clear and irresistible implications from the statute itself. Generally speaking, therefore, the State is not bound by the provisions of any statute, however generally it may be expressed, by which its sovereignty would be derogated, or any of its prerogatives, rights, titles or interests would be divested save where the act is specially made to extend to the State, or where the legislative inten-

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tion in that regard is too plain to be mistaken." *Black on Interpretation of Laws*, pp. 94, 95.

In the absence of the ordinances herein referred to the Territory of Hawaii through its superintendent of public works would undoubtedly have the right and power to erect territorial buildings, or additions thereto, throughout the Territory in its own way and without restriction whatsoever on the part of its political subdivisions. It is then clear that the enforcement of the ordinance in the case at bar would in effect restrict the Territory in the exercise of a right or prerogative which it enjoyed prior to the enactment of the ordinances.

"It is a familiar principle that the King is not bound by any Act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests." *The Dollar Savings Bank v. United States*, 19 Wall. 227, 239.

There is no sovereignty in this Territory other than that of the national government, but Congress has delegated to certain officials of the Territory certain powers and authority, including, as above noted, authority to the superintendent of public works in the matter of the erection and maintenance of public buildings. See Organic Act, Sec. 75.

The supreme court of Kentucky, in deciding a case in favor of the State, as represented by the Kentucky Institution for Education of Blind, where the specific question was, "Is an ordinance requiring all buildings of a certain class to have fire escapes, applicable to the property of appellant, which is an institution of the State; and if so, is it a valid ordinance," said:

"It is not shown that there is any fund appropriated by the legislature to this institution which might be applied to the purpose of repairing or adding to its buildings. But

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beyond that is the larger question, and the one upon which this decision is rested; that is, that the state will not be presumed to have waived its right to regulate its own property, by ceding to the city the right generally to pass ordinances of a police nature regulating property within its bounds." *Kentucky Institution for Education of Blind v. City of Louisville*, 8 L. R. A. N. S. 553.

Counsel for plaintiff vigorously contends that the Territory, if it is not bound by the ordinances herein referred to, might, through its officials, erect within the city of Hilo or in the larger and more densely populated city of Honolulu fire traps which would be a menace to the inhabitants and would tend to greatly depreciate the value of surrounding property. To us this seems an idle apprehension. Surely the territorial officials cannot be presumed to be less zealous of the public weal or the safety and protection of the inhabitants of the Territory than are the officials of the several political subdivisions thereof. But be that as it may, we are bound by the fundamental rules of statutory construction, and the law applicable to the question before us, which is that the State will not be presumed to have waived its rights to regulate its own property by ceding to its political subdivisions the right generally to pass ordinances of a police nature regulating property within their limits.

We therefore hold that the ordinances of the County of Hawaii herein referred to do not include and are not binding upon the Territory of Hawaii or its officials properly acting for the Territory, and so holding both subjects contained in the reserved questions of law are disposed of. The reserved questions are answered in the negative.

Harry Irwin (*H. L. Ross* with him on the brief) for plaintiff.

W. H. Heen, Deputy Attorney General (*I. M. Stainback*, Attorney General, with him on the brief), for defendants.

Quarles, J., dissenting.

DISSENTING OPINION OF QUARLES, J.

I am unable to concur in the opinion of the majority. The quotation from *The Dollar Savings Bank v. United States*, 19 Wall. 227, found in the majority opinion, was upon a matter *obiter*, as Mr. Justice Strong who wrote the opinion suggested at page 240. That "the king can do no wrong" is a maxim of the common law based on the idea that all sovereignty vested in the king. That rule cannot obtain in a Territory where the sovereign power is vested in the federal government, and the powers exercised by the territorial government are only delegated powers. The doctrine that the government can do as it pleases, that the king, president or governor and the heads of departments may do as they please, because dealing with property of the government, has not, according to my research, obtained in Hawaii under either the monarchy, the republic or the territorial government. The maxim quoted is at variance with the spirit of our institutions. It is a well settled rule in this jurisdiction that injunction will lie against a public officer, an officer of the government, to prevent an illegal act affecting government property (*Castle v. Minister of Finance*, 5 Haw. 27; *Lucas v. Amer. Haw. E. & C. Co.*, 16 Haw. 80; *Castle v. Secretary of the Territory*, 16 Haw. 769; *McCandless v. Carter*, 18 Haw. 221). In the latter case, a suit in equity to obtain an injunction restraining the governor and commissioner of public lands from exchanging certain public lands for other lands, the court at page 224 said: "Perhaps a citizen and taxpayer's right to restrain official acts affecting public property ought not to be based on the pecuniary loss, howsoever trivial or conjectural, but on the broad ground that any citizen may obtain a judicial inquiry into the validity of such acts and an injunction against them if found to be unauthorized." It has been said that this quotation from the case last cited is dictum which was impliedly disapproved by the supreme court of the United States in

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McCandless v. Pratt, 211 U. S. 437, and by this court in *Wilder v. Pinkham*, ante p. 571. These two decisions recognize the rule that a taxpayer, the amount of whose taxes will be increased by a proposed unauthorized act of territorial officers, may maintain a suit for injunction to restrain such act. In *McCandless v. Pratt*, supra, the writ of error was dismissed by the supreme court of the United States because it did not appear that the plaintiff had a personal interest injuriously affected, the proposed exchange appearing to be beneficial rather than injurious. In *Wilder v. Pinkham*, supra, it is said (p. 573): "The theory upon which a suit by a taxpayer to restrain the illegal expenditure of public money may be maintained is that of protection to the property rights of the complainant." In the case at bar the allegations of plaintiff's bill show that its property rights will be injuriously affected if the proposed building to be erected by the defendant is not restrained, as such building, a wooden structure, twenty-four feet distant from plaintiff's building, will most certainly increase the risk of fire to plaintiff's property and add to the cost of insuring the same. The citations hereinbefore made of Hawaiian decisions are to show that the rule is established in this jurisdiction that a territorial officer may not do with territorial property as he pleases but must act within the law, and this principle is recognized in *McCandless v. Pratt*, supra, and in *Wilder v. Pinkham*, supra.

In my opinion the statutory provisions cited in *Kentucky Institution for Education of Blind v. Louisville*, 97 S. W. (Ky.) 402, 8 L. R. A. N. S. 553, distinguish that case from the case at bar. I think the principle upon which the decision in *Pasadena School District v. City of Pasadena*, 166 Cal. 7, is based, correct and applicable to the case at bar.

It appears to be conceded by the majority that the legislature of the Territory has the power to authorize municipi-

Quarles, J., dissenting.

palties to make building regulations and establish fire districts for that purpose. In my opinion the legislature in sub-section 6 of section 1554 R. L., in granting to municipalities the power to make fire regulations, intended that those regulations, when made, should be binding upon all persons whether they happen to hold a territorial office or not. I do not believe that the legislature in enacting the statute intended that a fire regulation, made for the purpose of preserving the property and lives of citizens, should be violated by the superintendent of public works or any other public officer. To permit public officers to violate the ordinance, would, to some extent, defeat the object and purpose of such fire regulations. The statute provides that when a fire district is established its limits shall not be changed except by extension. This provision, as I read it, prohibits decreasing the area of the fire district after it has been established, and I think the legislature so intended. If certain property in it is eliminated because it happens to pass to the ownership of the government large portions of the area might so pass, thereby decreasing the area of the district and changing its limits without extending them. I do not understand that the legislature meant by the word "limits" the mere exterior boundaries of the fire district. If so, the municipality may create a fire district covering the business center where the risk to person and property from fires is great, and without changing the exterior boundaries cut out block after block until very little, except a small space just inside the exterior boundaries, would be left. To my mind that would violate the spirit of the statute. Under conditions and circumstances easily foreseen the rule announced in the majority opinion might lead to such result. This suggests to my mind the danger of assuming that the legislature did not intend the fire regulations, when made, should be binding upon the Territory. If the Territory may erect a wooden building

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within the fire limits of a municipality in violation of the law which binds everybody else, because it is exercising control of its own property, then it may store explosives and inflammable matter in and upon such property, thereby greatly increasing the danger to life, limb and property of the citizen.

Holding the fire regulations in question to be applicable to the property of the Territory and to the defendants does not prevent the use of its property by the Territory and does not prevent the erection of an armory according to plans and specifications regulated by the ordinances of the city of Hilo, which ordinances have been expressly authorized by the legislature.

In my opinion the reserved questions should be answered in the affirmative.

HAWAIIAN TRUST COMPANY, LIMITED, TRUSTEE
UNDER THE WILL OF GEORGE GALBRAITH,
v. MARY McMULLAN, DAVID JOSEPH Mc-
VEIGH, A MINOR, MARIA VIRGINIA McVEIGH,
A MINOR, SARAH DOCHERTY, DANIEL Mc-
VEIGH, MARY McCUTCHEON, PATRICK Mc-
VEIGH AND HELEN JOHNSTONE.

No. 1003.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 26, 1917.

DECIDED APRIL 3, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

ANNUITIES—*nature of interest of annuitant.*

Ordinarily a gift of an annuity to a person, without words of

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limitation or other significant language is to be regarded as a gift of the annuity during the life of the annuitant, but where an annuity is given to one for a specified period of time, an intent is to be inferred that it was not to terminate with the life of the annuitant. Held, accordingly, that where property was given by will to a trustee to hold until the death of the last survivor of a number of annuitants and for twenty-one years thereafter, to pay certain annuities and to accumulate the unapplied income, and then divide the trust estate "among those persons entitled at that time to the aforementioned annuities," an annuity payable to the children of S. P. "for life and then to their heirs" the interest of the heirs in the annuity was for the entire period of the trust, and upon the death of one his share became payable to his heirs.

DESCENT AND DISTRIBUTION—*conflict of laws—succession of interest in personal property.*

The right to an annuity payable out of the income of a fund held in trust, being personal property, is distributable, upon the death of the annuitant intestate, according to the laws of the country where the decedent was domiciled at the time of his death.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal from a decree of a circuit judge sitting in equity in a suit instituted by the trustee under the will of George Galbraith, deceased, for instructions regarding the payment of a certain annuity as to which conflicting claims had arisen and as to the proper disposition of which the trustee was in doubt. We quote the following statement of the case and claims of the respective parties from the opinion of the circuit judge:

"George Galbraith, a former resident of this island, now deceased, by his last will and testament, duly admitted to probate in this court, devised and bequeathed to the plaintiff, Hawaiian Trust Company, Limited, an Hawaiian corporation, a large estate charged with certain trusts. Included among the trusts referred to, is the payment of annuities to some forty-seven annuitants named in said will. With reference to a large number of these, and which

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include the annuities involved herein, they are bestowed 'for life, and then to their heirs.'

"The particular fund involved in this suit is a portion of an annuity (or annuities), bequeathed, by said will to 'Sarah Patton's children, \$300.00.' The pleadings and proofs establish the fact that Sarah Patton had two children, who became entitled to said annuity in equal moities—viz., Robert Patton, a son, and Margaret McVeigh, a daughter. That Margaret McVeigh has since deceased, leaving six children her surviving. The deceased mother's share of said annuity (\$150 per annum), was equally divided among her said six children, whereby each became entitled to, and until recently, received an annuity of twenty-five dollars. That William McVeigh, one of the said six children of Margaret McVeigh, died in the month of August, 1914, leaving him surviving, a widow, Mary McVeigh (now Mary McMullan), and two children, viz., David Joseph McVeigh, a son, and Maria Virginia McVeigh, a daughter, both minors, and for whom Charles S. Davis, Esq., an attorney of this court, was appointed guardian ad litem herein. The five surviving brothers and sisters of said William McVeigh, viz., Sarah Docherty, Daniel McVeigh, Mary McCutcheon, Patrick McVeigh, and Helen Johnstone, as well as the surviving widow and children of said William McVeigh (already named), were made defendants herein, and they have all made due and formal appearance and answer to plaintiff's bill. The bill asks the instruction of the court as to what disposition shall be made of the twenty-five dollar annuity heretofore paid to said William McVeigh, now deceased, and alleges that claim thereto is made by the said surviving brothers and sisters of said William McVeigh, as also by his widow and children. The said brothers and sisters of the deceased annuitant have appeared and answered jointly, and claim that, under the will, the 'heirs' of Margaret McVeigh (their mother), took said annuity of one hundred and fifty dollars, in succession to their said mother, as joint tenants, and that therefore, upon the decease of William, the share heretofore pertaining and belonging to him, goes to his brothers and sisters, as such joint tenants, in equal parts. Mary McMullan (widow of the deceased), answers separately, and claims that the language of the

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will, bequeathing the several annuities to the annuitants therein named 'for life, and then to their heirs,' conferred upon the six children of Margaret McVeigh, absolute interests in her share of said annuity, in the proportion of one-sixth to each of them; and that it follows, as an incident of said absolute ownership and interest, that they, or any of them, might have disposed of their several interests therein, or, having failed to so dispose of the same, either by assignment or by will, their respective shares and interests will be disposed of according to the statute of descent, of Hawaii. The deceased, William McVeigh, made no disposition, by will or otherwise, of his share or interest in said annuity, and, according to the claim of Mary McMullan, it should now be disposed of as personal property, under the laws of succession of the Territory of Hawaii. The result of this reasoning would be that one-third thereof would go to his widow (now Mary McMullan) by way of dower, and, the remaining two-thirds be divided equally between his two children above named, and who are herein represented by Mr. Davis as their guardian *ad litem*. Involved in this claim, also, is the further claim that, even though it should be held that the laws of succession or inheritance prevailing in Hawaii do not apply in this case, because of the British citizenship and Scottish residence of William McVeigh, yet by the laws of Scotland (proven to the satisfaction of the court by the deposition of a Scottish lawyer, on file herein), one-third of the share or interest of the deceased would go to his widow by descent, and not by way of dower. In short, the claim is, that Mary McMullan takes an absolute one-third in the share or interest of her deceased husband, whether the law of Scotland or the law of Hawaii be found to be applicable to the case, the sole difference being that under the Scottish law, she would take as an heir, while, under Hawaiian law, she would take as a dowress. This is also the view taken by counsel for the plaintiff, who have filed a brief, in supplement of their oral argument. The remaining claim is that advanced by the guardian *ad litem* on behalf of the minor children of the deceased, and is to the effect that the word 'heirs' as used

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in the phrase above quoted from Galbraith's will, means, first, the heirs of Margaret Patton McVeigh, the first taker, —second, the heirs of Margaret Patton McVeigh's heirs respectively, and so on, *ad infinitum*, during the term provided for the existence of the trust, which is the life of the survivor of the annuitants, *plus* twenty-one years thereafter."

The circuit judge held that upon the death of William McVeigh his share of the annuity became payable, one-third to his widow, now Mary McMullan (either as an heir under the law of Scotland, or by way of dower under the law of Hawaii), and one-third to each of his two children, David and Maria, and their respective heirs or assigns.

By his will, the testator, after providing for the payment of a number of legacies, left the residue and remainder of his estate to the Hawaiian Trust Company, Limited, in trust "for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute," and "to devote sufficient of the annual income derived from the same toward paying the following annuities." Then followed a list of annuitants and the amounts of the annuities—some of them payable, as in this case, to a class—including "Sarah Patton's children, \$300, yearly." Then the testator said, "All of the foregoing for life, and then to their heirs, save and except the last three persons, namely, Josie Fink, Emma Douglass and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease. On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities."

The validity of the trust as one to continue until the death of the last surviving annuitant of those designated in the will and for the period of twenty-one years thereafter, at which time the trust fund with accumulated and un-

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applied income is to be divided and distributed, was sustained in *Fitchie v. Brown*, 18 Haw. 52; affirmed in 211 U. S. 321.

It is conceded that the children of Sarah Patton took the annuity in equal shares for their respective lives only, and that the word "heirs" in the phrase "and then to their heirs," is a word of purchase. The question is as to the quality of the interest which the heirs take under the clause above quoted. The intent of the testator is to be found in the language of the will taken as a whole. Ordinarily a gift of an annuity to a person, without words of limitation, or other significant language, is to be regarded as a gift of the annuity during the life of the annuitant; and a gift of an annuity to one for life, and then to another, is understood to mean to that other for life unless a different intent is indicated. And it has been held in several cases that where an annuity is given to one for a term of years or for the life of another, an intent is to be inferred that it is not to terminate with the life of the annuitant. See 3 C. J. 205, 206; 2 A. & E. Enc. Law (2d. ed.), 393. In the case at bar the gift to the heirs of Sarah Patton's children was without words of limitation, but as it is evident from the final clause in the will that the testator intended that those heirs (their representatives or heirs) should be included in "those persons" among whom the corpus of the estate would be divided an intent on his part is fairly inferable that the annuities given to the heirs were not to terminate at their respective deaths. In other words, that the annuities were given to them for the period during which the trust was designed to continue. There is no legal obstacle to the carrying out of that intent. See *In re Follett*, 23 R. I. 409; *Stevenson v. Stevenson*, 91 Ky. 50; *Merrill v. Bickford*, 65 Me. 118; *Montanye v. Montanye*, 51 N. Y. S. 538; *In re Shuford*, 164 N. C. 133; *Goodyear etc. Co. v. Dancel*, 119 Fed. 692; *Robinson v. Hunt*, 4 Beav. 450. In the case of

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In re Ord, L. R. 12 Ch. Div. 22, where it was held that an annuity given to the testator's son during the lifetime of the widow, upon the death of the son in the lifetime of his mother, became payable to his personal representatives until the death of the widow, James, L. J., said (p. 25), "It has never been doubted that a gift of an annuity for a term or *pur autre vie* is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie*." And in *Blight v. Hartnoll*, L. R. 19 Ch. Div. 294, 296, Mr. Justice Fry said, "As a general rule there can be no doubt that the gift of an annuity to A, is a gift of the annuity during the life of A and nothing more. It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity."

There is considerable discussion in the briefs as to whether it was decided in the case of *Thurston v. Allen*, 8 Haw. 392, that in case of a deed or will of property to two or more persons they take as tenants in common unless it be expressly declared to be a joint tenancy, applies to personal property as well as to real estate. Counsel for the brothers and sisters of William McVeigh argues that that case did not so decide, and that the common law presumption in favor of joint tenancies should be applied here. But as by the statute of descent (R. L. 1915, Chap. 179) the personal property of an intestate goes to the same heirs as his real property we think it follows that a like presumption in favor of tenancies in common should apply to personal property and that in order to avert the statutory course of descent a title by joint tenancy should be affirmatively shown. See *Zupplein v. Austin*, 6 Haw. 8. The natural inference to be drawn from the language of this will is that the testator intended that the heirs should take the an-

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nuities in equal shares, and we find no indication that he contemplated that only those who should be the survivors in each class, and their descendants, should succeed to the annuities and share in the division of the corpus of the estate to the exclusion of the children or other heirs of those who may have previously died.

The contention advanced on behalf of the children of William McVeigh to the effect that the word "heirs" as used in the clause above quoted includes heirs of heirs in successive life interests, the heirs to be determined by the statute of descent of Hawaii, and, therefore, including William's children but excluding his widow, cannot be sustained. The gift was to the heirs of Sarah Patton's children. The heirs of Margaret McVeigh were those who at the time of her death would inherit from her under the statute of descent, namely, her children. William's children, William being alive when his mother died, were not heirs of Margaret.

The interest of William McVeigh in the annuity, then, was for the entire period of the trust if he should live till the arrival of the time for the distribution of the estate, and, if not, for his heirs or personal representatives during the life of the last survivor of the annuitants and for the further period of twenty-one years.

In several of the cases above cited the annuity was held to be payable to the executor or administrator of the deceased annuitant, while in *Stevenson v. Stevenson* it was held to be payable to the annuitant's children. No question in this connection has been raised in this case. William McVeigh died intestate, but it does not appear that he left any debts or that an administrator of his estate was appointed. We assume, therefore, that his heirs may properly take directly.

The heirs of Margaret McVeigh would be determined by the law of descent of this Territory (*Hawaiian Trust Co.*

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v. *Galbraith*, 22 Haw. 78) but the persons to take the share of her son William upon his death would be determined by the law of Scotland, his place of domicil. *Eidman v. Martinez*, 184 U. S. 578, 581; *Yore v. Cook*, 67 Ill. App. 586; *Brewer v. Cox*, 18 Atl. (Md.) 864; *Gibson v. Dowell*, 42 Ark. 164; *Lawrence v. Kitteridge*, 21 Conn. 576. "It has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. The principle applies equally to cases of voluntary transfer, of intestacy and of testaments." 2 Kent Com. 428. It was shown that by the law of Scotland the widow would take as heir a portion of the annuity equal to that of each of the decedent's two children. It is not necessary to consider the question whether, if the law of Hawaii (R. L. Sec. 2977) applied, the widow would take an absolute interest in one-third of the annuity by way of dower or the further question whether in this jurisdiction a widow may have dower in an equitable interest in property.

We hold that the circuit judge was right in directing the trustee to pay the annuity previously paid to William McVeigh to his widow and two children, as his heirs, one-third to each.

The decree appealed from is affirmed.

B. Knollenberg (*Frear, Prosser, Anderson & Marx* with him on the brief) for plaintiff.

A. Perry for Mary McMullan.

A. G. Smith for the brothers and sisters of William McVeigh.

C. S. Davis, guardian *ad litem*, for the minor children of William McVeigh.

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ANNIE GARVIE EVANS *v.* JAMES GARVIE AND
BISHOP TRUST COMPANY, LIMITED, TRUSTEE.

No. 989.

MOTIONS FOR ALLOWANCE OF COUNSEL FEES.

ARGUED APRIL 2, 1917.

DECIDED APRIL 5, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

TRUSTS—*expense of litigation—counsel fees*

Where conflicting interests of beneficiaries under a trust require the institution of a suit in order to determine the proper disposition of certain funds, and the litigation is for the general benefit of the parties interested in the trust, reasonable fees may be allowed to be paid to counsel for the respective parties out of the corpus of the trust estate.

Per Curiam: Following the rendition of the opinion in this case (*ante* p. 651) motions were filed by respective counsel for Mrs. Evans and for the guardian of the minor that they be allowed reasonable sums as counsel fees for services in the case to be paid out of the corpus of the estate.

We think the case, though it took the form of a submission without action upon agreed facts, should be regarded in the same light as if the trustee had filed a bill for instructions. The statement of facts set forth the conflicting claims of the mother and the son, and that the trustee was uncertain in respect to its duty as to what apportionment, if any, should be made of the stock dividends as between the parties. The matter of the apportionment of extraordinary dividends upon corporate stock held in trust where the accumulated earnings, upon which a dividend was based, accrued, partly before and partly after the institution of the trust, was not passed upon in *Carter v. Crehore*. It was an open question in this jurisdiction, and the decisions elsewhere are inharmonious. It was a ques-

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tion which the trustee could properly have submitted to a court with a prayer to be instructed as to its duty. The submission of the matter to this court was, therefore, a proceeding for the benefit of the estate and in the interests of all the parties concerned.

The circumstances of this case are different from those involved in *Von Holt v. Williamson*, ante p. 245, where the successful party established a right to certain income by way of a resulting trust, and in which claims of counsel for fees were disallowed. The decision in that case is consistent with the view that where litigation is in advancement of, and not in opposition to, the interests of all the beneficiaries of a trust counsel fees may be allowed to be paid out of the corpus of the trust fund. In 2 Perry on Trusts (6th ed.), Sec. 899, it is said, "The general rule, that trustees are to have their costs, applies whether they are plaintiffs or defendants; and so all persons whom it is necessary for the trustees to bring before the court as parties, in order to obtain a valid decree to protect them in the discharge of their duties in disposing of the trust fund, will be entitled to their costs." See also, as to the payment of counsel fees out of the corpus of the trust fund, *Barnard v. Adams*, 58 Fed. 313, 319; *Lombard v. Witbeck*, 173 Ill. 396, 413; *Dodge v. Williams*, 46 Wis. 70, 106.

Under the terms of the trust instrument involved in the case at bar Mrs. Evans is entitled to the entire net income, but she, as well as her son James, is interested in the corpus of the trust fund. That is to say, if Mrs. Evans is alive when her son attains the age of twenty-one years, the trustee is to convey and deliver one-half of the property to the son and hold the other half for Mrs. Evans absolutely. In case the son should not reach that age the mother will become entitled to the entire estate. And if the mother should die before the son reaches the age of twenty-one, the son is to take one-half and Mrs. Evans' heirs the other half

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of the estate. Under the circumstances it would seem just and equitable that counsel for the respective parties should be paid their fees out of the corpus of the estate in which both of the parties are interested in the manner stated. The litigation having been for the general benefit of the trust it seems appropriate that the expenses should be paid generally out of the trust fund. We so hold.

The case was well presented by counsel, and its preparation and presentation no doubt required as much labor, thought and attention as though very large pecuniary interests were at stake. This estate, however, is not a wealthy one and the value of the shares in controversy not large. The compensation should be reasonable. All the circumstances having been considered, the respective counsel are allowed two hundred dollars each to be paid them by the trustee out of the corpus of the fund held by it.

W. L. Stanley and *W. B. Lymer* for the motions.

P. R. Bartlett for the trustee.

FIRST AMERICAN SAVINGS AND TRUST COMPANY, OF HAWAII, LIMITED, *v.* EBEN P. LOW.

No. 1007.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED APRIL 3, 1917.

DECIDED APRIL 11, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

LIMITATION OF ACTIONS—*acknowledgment of debt—promise to pay.*

A clear, definite and unqualified acknowledgment made by the maker of a promissory note, after the statute of limitations has run against it, that the note is a valid and subsisting obliga-

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tion for which he is liable will give rise to an implied promise to pay it.

SAME—giving security or substituting collateral.

The giving of security or the substituting of collateral to secure payment of a note is a sufficient acknowledgment to remove the bar of the statute.

SAME—acknowledgment made to stranger.

An acknowledgment made to a mere stranger, where it is not shown that it was made with the intent on the part of the debtor that it should be communicated to the creditor, nor that it was in fact communicated to him and lulled him into inaction, is ineffective to remove the bar.

OPINION OF THE COURT BY ROBERTSON, C.J.

In the plaintiff's amended complaint it is alleged that on or about the 23d day of January, 1909, the defendant made and delivered to one Miller his promissory note for the sum of \$5000, payable to Miller's order six months after date, with which was assigned and delivered, as collateral, certificate No. 15 for 67 shares of the capital stock of Miller Salvage Company; that there was an indorsement by Miller (undated) of the payment of \$2000 on account of the principal, and, for value received, an assignment of the note and a waiver of demand, protest and notice of non-payment, by Miller to the First American Savings and Trust Company of Hawaii, Limited, dated September 27, 1909; that the plaintiff is now the owner and holder of the note; that on the 17th day of June, 1912, the defendant acknowledged the said note to be a valid and subsisting obligation and did thereby promise to pay the same in and by a certain writing as follows:

“Honolulu, Hawaii, June 17, 1912.

“First National Bank,
“City.

“Gentlemen:

“I hereby authorize you to surrender the sixty-seven (67)

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shares of the capital stock of the Miller Salvage Company, Limited, standing in my name, and held by you as collateral to my note for \$3000.00 in favor of F. C. Miller, which note is held by you as collateral to a certain note of F. C. Miller in your favor for \$6000.00, to the B. F. Dillingham Co., Ltd., and to receive in return a certificate for 34 shares of the capital stock of the Miller Salvage Co., Ltd., made out in the name of F. C. Miller and endorsed by him.

Yours truly,

(Signed) Eben P. Low."

Also that there is now due and owing the plaintiff upon the said note the principal sum of \$3000, with interest from July 23, 1909, and that the same remains unpaid though demand for payment has been made upon the defendant. The defendant demurred to the amended complaint on the grounds, (1) that the complaint shows that the claim sued upon is barred by the statute of limitations, and (2) that the alleged acknowledgment by the defendant is not such an acknowledgment as would revive the debt or prevent the running of the statute of limitations. The circuit judge, being in doubt as to whether the demurrer should be sustained upon the grounds stated, reserved the question for the consideration of this court.

Under the statute an action upon a promissory note must have been commenced within six years from the date when the cause of action accrued. R. L. 1915, Sec. 2633. It appears from the allegations of the complaint, therefore, that unless the letter of June 17, 1912, constituted a sufficient acknowledgment that the note was a valid and subsisting obligation from which a promise to pay may properly be implied, the statute has run against the claim, and the demurrer should be sustained. *Otokichi v. Sekijiro*, ante p. 234. That the letter in question did not constitute such an acknowledgment is urged by counsel for the defendant for two reasons, namely, that the reference to the note was

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merely casual and the whole letter is suggestive rather of a settlement of the debt by the absolute assignment of the stock which had formerly been held as collateral security than of an acknowledgment of a subsisting debt which the debtor is willing to pay, and that the acknowledgment, if it was such, not having been made to the holder of the note, but to a stranger, was ineffective. Counsel for the plaintiff contend that the terms of the letter constituted an unequivocal acknowledgment from which the law will imply a promise to pay, and they rely upon the rule that where an acknowledgment is made to a stranger and it appears that it was the intention that it should be communicated to and influence the creditor it is as effectual as if it had been made directly to the creditor.

The statute of limitations is one of repose and in order to remove the bar of the statute it is necessary to show either an unconditional promise to pay the debt, or a clear and unqualified acknowledgment of the debt from which a promise to pay is to be implied, or a conditional promise to pay and the fulfilment of the condition. 25 Cyc. 1325. The alleged acknowledgment being in writing its interpretation and effect are for the court to determine as matter of law. *Id.* 1435; *Davis v. Mills*, 21 Haw. 167. In *Welch v. Spencer*, 4 Haw. 358, it was held that an agreement between debtor and creditor in which it was recited that certain notes were "due and unpaid" was sufficient to take the notes out of the statute. In *Harris v. Clark*, 18 Haw. 569, where a clear acknowledgment of the debt was accompanied with language which negatived an intent to promise payment, it was held that the bar of the statute was not removed. We are of the opinion that the defendant's letter of June 17, 1912, taken, as we must take it, without qualification or explanation, can be viewed only as a clear and definite acknowledgment that his note was a valid and

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subsisting obligation for which he was liable, and that therefrom his promise to pay it is to be implied.

It has been held that the giving of security constitutes a sufficient acknowledgment of a debt to take it out of the operation of the statute. 25 Cyc. 1343. In *Wagner v. Mutual Life Ins. Co.*, 88 Conn. 536, 544, the court said, "The giving of security for a debt barred by the statute of limitations, waives the benefit of the statute and operates as an unequivocal acknowledgment of the existence of the debt, from which the law implies a promise to pay the debt. It is an acknowledgment of liability as significant as a part payment of the debt; both acts are alike in character and equally unequivocal." In *Becker v. Oliver*, 111 Fed. 672, 678, where, in connection with the giving of additional security for notes, there was a disputed fact, it was held that the question was properly left to the jury. In the case at bar it is not alleged that the substitution of collateral was actually made, but we think the attitude of the defendant with respect to his note was effectually shown by his authorization to make the substitution and that it need not further be made to appear that it was acted on. We hold, therefore, that if the defendant's acknowledgment had been made directly to the plaintiff it was such an acknowledgment as would have obviated the bar of the statute.

It is well settled that an acknowledgment made to an agent of the creditor is as effectual as though made to the creditor himself, also that an acknowledgment made to a mere stranger is ineffective. But it is held that if it was made to a third party with the intent and understanding that it should be communicated to the creditor it will have the same effect as if made directly to the creditor. 19 A. & E. Enc. Law (2d ed.) 317; *Miller v. Teeter*, 53 N. J. E. 262; *DeFreest v. Warner*, 98 N. Y. 217, 221; *Strong v. Andros*, 34 App. Cas. (D. C.) 278, 283. And if such an

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acknowledgment be in fact communicated to the creditor it could well be held that the third party was the agent of the debtor authorized for that purpose. In the case in hand, however, it is not alleged that there was any privity, or other connection, between the bank and the plaintiff, or that the contents of the letter were communicated to the plaintiff. It does not appear that the letter lulled the plaintiff into inaction. The addressing of the letter to the bank may have been an inadvertence, though the language of the letter indicates that the defendant supposed that the bank was the holder of the note, but this is unexplained by any allegation in the complaint. As the matter stands the court is unable to say that the acknowledgment was made to the holder of the note, or its agent, or to a third party with the intent or understanding that it should be communicated to the creditor. In other words, there is nothing in the complaint to show that the bank was not a mere stranger to the whole transaction. Perhaps the plaintiff may desire to amend its complaint in this connection.

Holding that, for the above reason, the demurrer should be sustained, we answer the reserved question in the affirmative.

P. R. Bartlett (*Holmes & Olson* on the brief) for plaintiff.

Marguerite K. Ashford (*Castle & Withington* with her on the brief) for defendant.

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LILIA NUA v. LUHANA MAHELONA, DEFENDANT,
WILLIAM AHIA, INDIVIDUALLY AND AS AD-
MINISTRATOR OF THE ESTATE OF SOLOMON
MAHELONA, DECEASED, GARNISHEE.

No. 995.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED APRIL 2, 1917.

DECIDED APRIL 12, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

ATTACHMENT—*sufficiency of affidavit.*

An affidavit for attachment which shows the indebtedness of the defendant to the plaintiff "over and above all just credits and offsets" is sufficient without stating that the indebtedness is upon contract, express or implied, a fact to be determined from the complaint in the action.

SAME—*undertaking for attachment.*

Under section 2783 R. L. an undertaking for attachment in a sum not less than double the amount sued for is required, and where the undertaking for attachment is less than double the amount for which judgment is asked the attachment should be discharged on proper motion made.

PRINCIPAL AND AGENT—*assumpsit—liability of agent.*

An agent who receives money for his principal under promise to deposit it in bank for the principal and neither deposits the money in bank to the credit of the principal nor pays it to the principal, but delivers it to another who appropriates it to his own use, is liable therefor to the principal in an action of assumpsit.

OPINION OF THE COURT BY QUARLES, J.

This action of assumpsit comes before us upon exceptions. It is alleged in the complaint that the plaintiff advanced to the defendant April 17, 1911, the sum of \$850,

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it being agreed between them that the defendant would pay out of said money certain claims and demands against the plaintiff and place the balance of said sum in bank to the credit of the plaintiff; that defendant did pay said claims and demands amounting to the sum of \$110 but failed and refused to place the balance of said sum (\$740) in bank to the credit of the plaintiff, but instead of so doing did unlawfully and feloniously convert the same to her own use and has failed and refused, after demand therefor, to pay said balance or any thereof to the plaintiff. The plaintiff demanded judgment for \$740 with interest thereon at the rate of eight per cent. per annum from April 17, 1911. The plaintiff filed an affidavit for attachment in which it is stated that the defendant is indebted to plaintiff in the sum of \$740 over and above all just credits and offsets. The plaintiff also filed an undertaking for attachment in the sum of \$1,800 and procured a writ of attachment which was levied upon certain real property of the defendant. The defendant answered by general denial and moved that the attachment be discharged upon the ground that it was wrongfully, oppressively, maliciously and improperly sued out, particularly in that the bond for attachment given was in a sum less than double the amount for which the plaintiff demanded judgment. The trial court overruled the motion to discharge the attachment and one of the principal exceptions challenges the correctness of its action in this regard. The affidavit for attachment is attacked upon the ground that it does not state that defendant's indebtedness to the plaintiff is upon contract, express or implied. The affidavit substantially follows the language of the statute (Sec. 2782 R. L.) but fails to state that the defendant is indebted to the plaintiff upon contract, express or implied. While section 2781 R. L. provides that in actions upon contract, express or implied, a writ of attachment may issue, the following section (2782) does not require the affidavit

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to show that the action is upon contract—a matter which is to be determined by an examination of the complaint in the action. The affidavit was not insufficient on the ground upon which it is attacked. The amount of the debt and interest for which judgment is demanded in the prayer of the complaint amounts to more than \$1000 and the bond is for a sum less than double the amount sued for and is not a compliance with the requirements of the statute (Sec. 2783 R. L.), which we hold to be mandatory. The motion to discharge the attachment should have been granted. The exception to the order refusing to discharge the attachment is sustained.

The court rendered its decision in favor of the plaintiff and judgment against the defendant and in favor of the plaintiff was entered for the sum of \$740, the plaintiff having remitted the interest. To the decision and judgment the defendant excepted upon the ground that the decision and judgment were contrary to law and contrary to the evidence. The facts proven and found by the court are, briefly stated, as follows: Plaintiff, with the assistance of defendant and her husband, sold some property, and, being compelled to leave Honolulu about April 15, 1911, left the deed with defendant and her husband to be delivered, directing that the purchase price (\$850) be paid to the defendant who agreed with plaintiff to accept such purchase price, pay out of the same certain claims and demands against the plaintiff, and deposit the balance of said sum in bank to the credit of the plaintiff; that the defendant paid the claims and demands against the plaintiff amounting to \$110; that defendant and her husband, Solomon Mahelona, took the balance of said sum (\$740) to the bank of Bishop & Company, where the defendant, instead of depositing the money in bank, gave the same to her husband who deposited it in his own name and afterwards checked it out and used it. There is a slight conflict of evidence as to the agreement to deposit the

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money in bank, the defendant claiming that she was to deposit it in her name as trustee for the plaintiff and the plaintiff claiming that it was to be deposited in the bank in her own name and to her credit. It is contended by the defendant that she was a gratuitous bailee; that she used ordinary care in endeavoring to carry out the instructions of the bailor, and hence is not liable. It is unnecessary to enter into a discussion of the law of bailments. It is evident that the relation of principal and agent existed between the plaintiff and the defendant; that defendant received the money as agent for the plaintiff; and, acting under the instructions of the plaintiff, paid out a portion thereof but failed to deposit the balance of the money in bank according to plaintiff's instructions and according to her agreement, but negligently intrusted the money to her husband who wrongfully used it. Plaintiff was not in fault in the matter and the defendant was in fault in that she failed to discharge her obligation as agent for the plaintiff and, therefore, rightfully owes the money to the plaintiff. An agent who receives money for his principal under promise to deposit it in bank for the principal, and neither deposits the money in bank to the credit of the principal, nor pays it to the principal, but delivers it to another who appropriates it to his own use, is liable therefor to the principal in an action of assumpsit.

The exceptions to the decision and judgment are overruled. The cause is remanded to the circuit court with instructions to set aside the order refusing to discharge the attachment and to enter an order discharging the attachment for the reason that the bond required by section 2783 was not given as required by said statute.

W. J. Robinson for plaintiff.

C. F. Peterson for defendant.

Syllabus.

J. G. HENRIQUES v. Z. P. KALOKUOKAMAILE, JOSE
MEDEIROS AND I. KATO.

No. 996.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

ARGUED APRIL 9, 1917.

DECIDED APRIL 18, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

MORTGAGES—*mortgage of leasehold.*

The assignment of a lease of land by way of mortgage is not a chattel mortgage, but the conveyance of an interest in real estate within the meaning of R. L. Sec. 3118.

RECORDS—*lease—subsequent purchaser.*

An unrecorded mortgage of a lease of land is void as against one who, in good faith and without actual notice of the mortgage, takes a lease of the land from the owner, the lessor having in the meantime reentered for breach of condition on the part of the original lessee to pay rent.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action of ejectment to recover possession of a parcel of land containing an area of twelve acres, situate at Kalama 5, South Kona, county of Hawaii, described in Royal Patent (Grant) No. 1185. There was a verdict for the defendants, and the plaintiff brings exceptions under which it is contended that the judgment should be reversed because of certain errors committed by the trial court in instructing the jury.

The title set up by the plaintiff was a term for years under an assignment by way of mortgage of a lease of the land made by the defendant Kalokuokamaile, the owner of

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the fee, to one K. Aoyama for the term of twenty years from February 9, 1910, the mortgage being dated August 2, 1911, the defeasance clause providing for the payment to the mortgagee, in three months from that date, of the sum of fifty-five dollars. The mortgage was not recorded nor was its execution followed by immediate and continued possession of the land by the mortgagee. The theory upon which the case was tried by the plaintiff evidently was that as upon the expiration of three months from the date of the mortgage the mortgagor had not paid the sum mentioned the mortgagee had entered upon the land and taken possession, and, upon tender of the rent to the lessor, became his tenant without going through the formality of foreclosing the mortgage. The plaintiff testified that on or about the 13th day of November, 1911, he went to the premises and found Aoyama, and other Japanese, engaged in taking down a wooden water tank; that he told them to desist, saying "the place is mine;" that the Japanese completed the dismemberment of the tank and went away; that the plaintiff sent for his brother and son, and the three remained on the premises to see that the lumber of the tank should not be taken away during the night; that on the following morning the Japanese reappeared and proceeded to remove the lumber; that the defendant Kalokuokamaile and others also came to the place; that the plaintiff upon remonstrating with the Japanese was attacked by them; that a fracas ensued in which Aoyama stabbed the plaintiff with a knife and, in turn, was shot and killed by the plaintiff's son; and that subsequently the lumber was taken away and the tank was afterwards set up on other land of Kalokuokamaile; that about a month after the occurrence of the row the plaintiff happened to meet Kalokuokamaile and then told him that he had "bought the place" from Aoyama, but that Kalokuokamaile took the position that since the death of Aoyama the premises had reverted to him; and that in the

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following February Kalokuokamaile refused to accept rent from the plaintiff. There was no evidence that the plaintiff ever occupied the premises in question or that he attempted to exercise any right of ownership thereon further than above stated. At the time of the commencement of this action the defendant Kato was in possession of the premises.

The defendant Kalokuokamaile testified that Aoyama had not paid the instalment of rent which fell due in August, 1911; that after the death of Aoyama he spoke to Aoyama's brother in regard to the lease, and was told by the brother to "take everything;" that regarding the Aoyama tenancy as terminated he, on February 9, 1912, leased the land to the defendant Medeiros; that at the end of about a year Medeiros abandoned the premises, and on March 4, 1914, he leased the premises to the defendant Kato for the term of fifteen years. Medeiros was not a witness and it does not appear that he claims any present interest in the land.

If upon the uncontradicted evidence in the case the plaintiff was not entitled to recover judgment for the possession of the land it will not be necessary to consider the exceptions touching alleged errors in the charge to the jury. *Pilipo v. Scott*, ante pp. 26, 31.

Section 3120 of the Revised Laws provides that every mortgage or other conveyance of personal property, not accompanied by immediate possession and followed by an actual and continued change of possession of the things mortgaged or conveyed, shall be void as against subsequent purchasers, in good faith for a valuable consideration, unless the mortgage or other conveyance shall be recorded in the office of the registrar of conveyances. And the case has been argued by counsel upon the assumption that that section is applicable to this case. It is held, however, that statutes relating to chattel mortgages have no application

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to mortgages of chattels real, and that mortgages or assignments of leaseholds, if required to be recorded, should be recorded under the statutes relating to the record of titles to real estate. Jones on Chattel Mortgages, Sec. 280; 6 Cyc. 1082; *Booth v. Kehoe*, 71 N. Y. 341; *Jennings v. Sparkman*, 39 Mo. App. 663, 667. That, doubtless, is so in this Territory, but it does not affect our conclusion that in this case the exceptions must be overruled. Section 3118 of the Revised Laws provides that all deeds, leases for a term of more than one year, or other conveyances of real estate shall be void as against any subsequent purchaser in good faith and for a valuable consideration, not having actual notice of such conveyance. That section applies, of course, to mortgages of land, and, as we believe, to mortgages of leaseholds also. The statute differentiates between conveyances of real estate and conveyances of personal property and includes leases of land for a term of more than one year in the former category. That is consistent with the view that the provision of the statute of frauds (R. L. 1915, Sec. 2659) as to contracts for the sale of any interest in lands, includes a lease of land. See *Dimond v. Macfarlane*, 11 Haw. 181. That a lease of land is a conveyance of real property, and a lessee is a purchaser for a valuable consideration, see *Waskey v. Chambers*, 224 U. S. 564. The lease to Aoyama was put on record on March 13, 1912, presumably at the instance of the plaintiff, but in the meantime the lessor had reentered for breach of the covenant to pay rent, and had leased to Medeiros. There was no evidence that Medeiros, when he took the lease, knew that Aoyama had held a lease of the land or that the plaintiff claimed an interest in the premises as the assignee of Aoyama's lease, or otherwise. The plaintiff himself testified that it was after he had heard that Medeiros had obtained a lease of the land that he notified him of his (plaintiff's) claim. Kato's lease was recorded on January 30, 1915,

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but there was no evidence that he had notice of the assignment by way of mortgage of Aoyama's lease to the plaintiff. His testimony that he was first informed by the plaintiff of his claim in June or July, 1915, was uncontradicted. There was no evidence in the case which could have supported a finding that either Medeiros or Kato was not a purchaser in good faith, for a valuable consideration, without notice of the conveyance to the plaintiff.

In this court counsel for the appellant argued that the conveyance by Aoyama to Henriques was not a mortgage but a conditional sale, but he failed to show wherein any advantage would accrue to the appellant even if that view could be taken. However, the instrument was offered in evidence by counsel for the plaintiff as a mortgage; at his request instructions framed upon the theory that it was a mortgage were given to the jury; and we are of the opinion that the trial court was right in holding it to be a mortgage.

We hold that upon the uncontradicted facts of the case a verdict in favor of the plaintiff could not have been upheld; that the verdict for the defendants was right; and that if any errors occurred in the instructions given to the jury they were harmless.

Exceptions overruled.

J. Lightfoot (*Lightfoot & Lightfoot* on the brief) for plaintiff.

Harry Irwin (*W. H. Beers* with him on the brief) for the defendants *Kalokuokamaile* and *Kato*.

E. K. Aiu for the defendant *Medeiros*.

Syllabus.

NAMAI LEIALOHA v. MAHIAI.

No. 983.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED APRIL 16, 1917.

DECIDED APRIL 20, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

EJECTMENT—*variance—failure of proof.*

In an ejectment case where the plaintiff sought to recover 1 1-2 acres of land, and proves title to but one acre, and the proofs further show that the plaintiff is in possession of an acre and the defendant is in possession of an undefined parcel not exceeding a quarter of an acre in area, a nonsuit is properly granted for variance between allegation and proof, and failure of proof.

SAME—*pleading and proof—description of land in dispute.*

A declaration in ejectment should describe the land sought to be recovered with sufficient certainty that the land can be identified with the description given, and the proofs should show that the land of which the defendant is in possession is the land described in the declaration.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action of ejectment in which the plaintiff alleged ownership in herself in fee simple, and unlawful possession by the defendant, of a parcel of land described in the complaint as "situate at Pauwela, Hamakualoa, Island and County of Maui, being the hui land of Pauwela bought by William Lee recorded in book of the Government 226 and containing 1 1-2 acres." The defendant answered, and a trial was had jury waived. The plaintiff introduced documentary evidence of title as follows: Royal Patent No. 226 to Wm. L. Lee of a piece of land situate at

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Pauwela, Maui, described particularly, and containing an area of about 210 acres; a deed of the same parcel of land from Edward L. Youmans and his wife, Catherine N. Youmans to Aiawale and thirty other named persons, including one Palaualelo, dated April 20, 1864, and recorded in the office of the Registrar of Conveyances in Book 48, pages 296, 297; a deed from Kahakui and Waiwairole, her husband, and Kaahanui and Aiona, her husband, to Paia Kahoe, dated March 21, 1895, containing the following description: "all our interest in the one acre of Palaualelo, deceased, one of the share-holders in the Hui Aina of Pauwela, Hamakualoa, Maui, the said one acre being in the land described in Grant 226, issued to Wm. L. Lee and Edward L. Youmans and his wife to Aiawale et. al. by an instrument recorded in Book 48, pages 296 and 297;" and a deed dated November 28, 1908, from Paia Kahoe to the plaintiff of "the one acre of land of Palaualelo in the Hui Aina of Pauwela * * * and being the acre of land conveyed to me by Kahakui and Waiwairole, her husband, and Kaahanui and Aiona, her husband, the heirs of said Palaualelo, on the 21st day of March, 1895." The plaintiff testified that she occupied under the deed what she thought to be an acre of land and that the defendant is in possession of "a quarter or an eighth of an acre." There was perhaps a scintilla of evidence to the effect that the land of the hui had been divided but there was no evidence that Palaualelo was a party to the partition. At the close of the evidence for the plaintiff, which was very meagre and unsatisfactory, the defendant moved for a nonsuit. The motion was granted on the ground that the evidence showed that the plaintiff is in possession of one acre of land which was all her deed entitled her to, and judgment for the defendant was entered. Where a plaintiff in ejectment brings an action to recover the possession of 1 1-2 acres of land, and proves title to but one acre and the proofs further show

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that the plaintiff is in possession of that acre and the defendant is in possession of an undefined parcel not exceeding a quarter of an acre in area, it is very evident that the plaintiff will be unable to withstand a motion for a nonsuit. This, at best, was the situation in this case. There were missing links in the chain of title shown by the plaintiff, but the defendant has made no point of that. There was, however, a fatal variance between allegation and proof, and a failure of proof.

The root of plaintiff's difficulty lay largely in the uncertainty and inadequacy of the description in the complaint of the land actually in controversy. The general rule is that a declaration in ejectment should describe the land sought to be recovered with such certainty that it can be identified with the description given so that in the event of a recovery the officer executing the writ of possession will know what land the plaintiff is entitled to receive. 15 Cyc. 92. And the proofs should show that the land of which the defendant is in possession is the land described in the complaint. *id.* 116. Whether the complaint in this case could support a valid judgment for the plaintiff is a question which has not been discussed, but we have no doubt that the nonsuit was properly granted.

Judgment affirmed.

Eugene Murphy for plaintiff in error.

Enos Vincent for defendant in error.

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TERRITORY *v.* T. W. FERGUSON.

No. 1004.

APPEAL FROM DISTRICT MAGISTRATE OF MAKAWAO.

ARGUED APRIL 16, 1917.

DECIDED APRIL 23, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

LARCENY—*unknown owner.*

Section 3924 R. L. was intended to relate only to cases of larceny where the owner of the property is unknown and not to cases where the owner of the stolen property is known.

SAME—*ownership.*

The ownership of property alleged to have been stolen is a material fact and must be proved as alleged.

CRIMINAL LAW—*necessary evidence.*

Every material allegation in an indictment or information or charge against a defendant in a criminal case must be proven as alleged.

OPINION OF THE COURT BY QUARLES, J.

The defendant was tried in the district court of Makawao in the second judicial circuit upon the charge of stealing 246 pounds of pineapples alleged to be the property of the Maui Agricultural Company, a partnership, entered a plea of not guilty, and was convicted. From the judgment of conviction he has appealed to this court upon a point of law stated in the magistrate's certificate of appeal as follows: "That there is no evidence whatever to warrant a conviction of the defendant of the crime charged." The form and sufficiency of the statement of the point of law upon which the appeal is based is not questioned by the prosecution, but it is contended by the learned county attorney that the point of law stated should not be con-

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sidered in this court for the reason that it was not presented to and passed upon by the district magistrate prior to sentence, and to sustain this contention we are cited to the case of *Republic of Hawaii v. Kanalo*, 11 Haw. 435. The decision in that case is not controlling here and not applicable for the reason that the points of law stated in the Kanalo case were to the form and sufficiency of the charge against the defendant, and the defendant made no objection whatever to the form or sufficiency of the charge against him in the district court; but the point here is that there is no evidence tending to warrant a conviction of the defendant, in other words, that the defendant was convicted without evidence contrary to law. The prosecution introduced four witnesses against the defendant, no one of whom testified that the pineapples alleged to have been stolen are the property of the Maui Agricultural Company, but one of them testified that he was an employee of the Grove Ranch and that the pineapples came from the Grove Ranch, and he thought so owing to their size as there were none of the same size in the neighborhood. The witness Smythe testified that he marked nine pineapples with finishing nails driving them into the pineapples near the core; that the pines were lying about one hundred feet away from the field of the Grove Ranch on the property of Mr. Krause; that he got two police officers to go with him and in their presence he marked the pineapples with the nails and left them there in a bag. As to how the pineapples came to the particular place where they were marked and left in the bag there is no evidence on behalf of the prosecution to show. One of the police officers present when the pineapples were marked, as well as the witness Smythe who marked the pineapples, testified that they were marked on or about January 19, stating that it was on Friday; that on Saturday the bag of pineapples was still at the same place, and that they remained there as late as

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between six and seven o'clock on Monday evening following. Another witness testified, from hearsay evidence which was not objected to by the defendant, that the pineapples belonged to a Mr. Clark. The explanation of the defendant, who admitted taking the pineapples to the Maui cannery and selling them with others, was that he got some of them from his own place, then in the possession of one Borges, some of them from Turner's place by permission, and some from Collin's place by permission; that he left a bag of pineapples in Mr. Krause's field where he went with his horse and wagon to cut grass; that he took the bag of pineapples out of his wagon and laid it there in the field (where the witness afterwards saw it); that he worked till late cutting grass and went off and forgot the bag of pineapples; that he got it nearly a week afterwards and took the pineapples which he had left there in the bag with others, all making two crates, to the Maui pineapple cannery; that he got none of the pineapples from the Maui Agricultural Company's field. At the trial the defendant, to show that other pineapples as large as the ones in question were grown in the neighborhood, presented some pineapples which appear from the record to have been of about the same size as those alleged to have been stolen. It is contended on behalf of the defendant that the evidence does not prove a case of larceny in that there is no proof that the pineapples were the property of the Maui Agricultural Company as alleged in the charge against him. It is contended on behalf of the prosecution that it was not necessary to prove that the pineapples alleged to have been stolen were the property of the Maui Agricultural Company as alleged in the charge, and to sustain this contention section 3924 R. L. is cited, which is as follows:

"Sec. 3924. Owner unknown. It is not necessary, in respect to larceny, that it should appear whose property, other than the taker's, the thing is; it is enough that it appear

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that it is not the taker's, and that it does not appear to be derelict; and in case of doubt whether a thing is derelict, the presumption is that it is not so."

This statute was intended to relate to cases where the owner of stolen property is unknown and does not apply to a case where the owner of the property is known. Every material allegation in an indictment or information or charge against a defendant in a criminal case must be proven as alleged (*Territory v. Lau Hoon*, ante p. 616). The ownership of property alleged to have been stolen is a material fact (25 Cyc. 88) and when alleged must be proved as alleged. "Ownership must be proved by sufficient evidence or the conviction cannot be supported. Where the owner is alleged in the indictment as unknown, there can be no conviction unless it is proved that the grand jury did not know his name and could not discover it by due diligence, as by showing that the cattle stolen were estrays. So evidence that a certain person lost cattle like those stolen will not justify a verdict for stealing cattle of a person unknown" (25 Cyc. 125).

The evidence here failing to show that the property alleged to have been stolen was the property of the Maui Agricultural Company, but there being some evidence to show that it belonged to other parties there was a variance between allegation and proof and no evidence to show that the defendant committed the offense stated in the charge against him.

The judgment of the district court is reversed, a new trial is granted to the defendant and the cause is remanded for further proceedings consistent with the views expressed herein.

E. R. Bevins, County Attorney of Maui, for the Territory.

Eugene Murphy for defendant.

Syllabus.

TERRITORY *v.* LAM BO, ALIAS KWON SUN LOY.

No. 987.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED APRIL 16, 1917.

DECIDED APRIL 26, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

APPEAL AND ERROR—*verdict—evidence to sustain.*

Where there is more than a scintilla of evidence sustaining it a verdict finding a defendant guilty will not be disturbed.

OPINION OF THE COURT BY COKE, J.

The defendant, plaintiff in error herein, Lam Bo, alias Kwon Sun Loy, was tried by a jury in the circuit court of the second circuit charged with having sold liquor without a license to one Bolin at Paia, Maui, on the 19th day of September, 1916. The jury returned a verdict finding the accused guilty and he was sentenced by the court to pay a fine of one hundred dollars. Defendant, the plaintiff in error, comes to this court on a writ of error relying upon the single error claimed to have been committed in the trial of said cause, to wit, "that the verdict rendered herein is contrary to the law, the evidence and the weight of the evidence in that there is not more than a scintilla of evidence of the guilt of the defendant." The evidence introduced in behalf of the prosecution consisted of the testimony of Joseph Morris, captain of police of the district of Makawao and a police officer by the name of Jack Hana-maikai. Morris testified in effect to having given to one Bolin a marked dollar and instructing him to proceed to the store of the defendant Lam Bo to purchase liquor; that he

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and the other police officer took a position on the veranda of the store from which place they could look through a window and observe the transaction and hear the conversation between Bolin and the defendant; that Bolin entered the store of defendant and asked defendant if he had any beer; that defendant thereupon wrapped up four bottles of beer which he passed to Bolin who gave to defendant one dollar which the police officers later recovered from the possession of the defendant. It is further shown that on searching the store a box containing four and one-half bottles of beer was found in the defendant's store in addition to the four bottles claimed to have been sold to Bolin. The police officer Hanamaikai corroborated the testimony of Morris. The defendant gave evidence in his own behalf, and in denying the sale of the beer to Bolin explained that the four bottles of beer which he delivered to Bolin immediately preceding his arrest was beer that had been left at his store by Bolin earlier in the day and that the dollar paid to him by Bolin was a payment on account of a debt which Bolin owed to the defendant. Bolin, to whom it is claimed by the prosecution the beer was sold by the defendant herein, was not produced as a witness at the trial. This witness, possessing as he did first-hand knowledge of the alleged sale of liquor by the defendant, should have been called to testify by the prosecution or failure to call him should have been explained. The evidence of the prosecution, to say the least, was unsatisfactory. The jury, however, while it might well have done otherwise, found the defendant guilty, and it appearing to us that there is more than a scintilla of evidence tending to establish the defendant's guilt we are loath to disturb the verdict.

The judgment herein is affirmed.

Eugene Murphy for plaintiff in error.

E. R. Bevins, County Attorney of Maui, for the Territory.

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IN THE MATTER OF THE ESTATE OF MARIA C.
DE MELLO, DECEASED.

No. 1016.

PETITION FOR WRIT OF CERTIORARI.

SUBMITTED APRIL 23, 1917.

DECIDED APRIL 26, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

CERTIORARI—*pleading and practice.*

Where, before a writ of certiorari to review an alleged invalid order made by a circuit judge at chambers was issued, the order complained of had been set aside and substituted by another order entered by the circuit judge of his own motion, and the record sent up does not show that the petitioner had notice of the substitution before he applied for the writ but does show that the second order is open to the same objection as the first, the supreme court will not dismiss the writ or require an amendment to the petition or writ, but will dispose of the matter on its merits.

COURTS—*jurisdiction—probate order.*

A circuit judge sitting at chambers in a proceeding in probate has no authority to make an order directing a trustee to render an accounting or pay money into court.

OPINION OF THE COURT BY ROBERTSON, C.J.

In a petition for a writ of certiorari to be directed to Hon. J. W. Thompson, judge of the circuit court of the third judicial circuit, to send to this court the record in the Matter of the Estate of Maria C. de Mello, deceased, to the end that the validity of a certain order made and entered in said cause on the 21st day of February, 1917, might be reviewed, the petitioner, John de Mello, junior, represented, in substance, as follows: That on or about the 19th day of August, 1912, John de Mello, senior, was appointed administrator of the estate of Maria de Mello, deceased, by the

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circuit judge of the third circuit, sitting at chambers in probate; that on the 14th day of September, 1916, the administrator filed his final accounts; that the same were referred to a master and a report thereon was subsequently made, and a hearing thereon was had on January 17, 1917; that on February 21, 1917, the circuit judge made the order complained of as follows: "It is, therefore, the order of the court that John de Mello, junior, the alleged trustee of the above mentioned estate, within the period of thirty days from this date, make a complete accounting under oath to this court for any and all moneys received and paid out by him as such alleged trustee, filing all vouchers that he may have, and that he pay into the hands of the clerk of this court all moneys now in his hands belonging to the aforesaid estate of Maria C. de Mello, deceased;" that the circuit judge had no jurisdiction to make, render or enter said order; and that the petitioner has no appeal from said order, nor any plain, speedy or adequate remedy other than by a writ of certiorari. Upon that petition a writ issued from this court on March 27, 1917. In response to the writ so much of the record as relates to the order in question has been sent up. The record shows that the order was prefaced by certain recitals to the effect that whereas, upon the hearing had upon the administrator's petition for the allowance of his final accounts and discharge certain controversies had arisen between the administrator and certain of the heirs of the decedent, and that in order to settle those controversies certain alleged stipulations were entered into between the parties, and that an attempt was made by some of the heirs to appoint John de Mello, junior, trustee to manage the real estate belonging to the estate, and that the court cannot, for certain stated reasons, recognize the said stipulations or the alleged trust and trusteeship. Therefore the order was entered as above set forth. The record further shows that on March 19,

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1917, the circuit judge, of his own motion, vacated and set aside the said order and entered a new order which recited, *inter alia*, that "whereas, it appearing that John de Mello, Jr., was appointed to act, without giving bond, as trustee of the Estate of Maria C. de Mello, deceased, by the heirs at law, with the exception of the concurrence of the children of the said Mrs. Carrie Mereira, also deceased, some of whom are minors, and who were not represented in the aforesaid appointment of John de Mello, Jr., as trustee as aforesaid," and ordered that "the alleged trustee of the above mentioned estate, within the period of thirty days from this date, make a complete accounting under oath to this court for any and all moneys received and paid out by him as such trustee, filing all vouchers that he may have. and that he pay into the hands of the clerk of this court such a sum of money as the minor heirs of his deceased sister, Mrs. Carrie Mereira, are entitled to." The order contained also certain provisions relating to the accounts of the administrator. Both of the orders were entitled "At Chambers. In Probate. In the Matter of the Estate of Maria C. de Mello, deceased." The record does not show that John de Mello, junior, or his counsel, were given notice of the revocation of the order of February 21, or of the entry of the order of March 19. It will be observed that the latter order was to the same effect as the former except that the latter required the trustee to pay to the clerk of the court only such money as the minor children of Carrie Mereira are entitled to. Counsel for the petitioner were asked to submit a brief on the points whether, in view of the fact that the order sought to be reviewed had been set aside before the writ issued from this court, the writ should be dismissed, and whether the petition might be amended. We are of the opinion that as the record of the lower court is now here before us, and that it does not appear therefrom that at the time the petition for the writ was filed counsel

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were aware that the order complained of had been set aside, and as it does show that the ground of objection to the first order applies equally to the substituted order, nothing would be gained by the filing of a new or amended petition or the issuance of a new writ, we may well dispose of the matter under the writ which was issued and the return thereto.

It is clear that the circuit judge, sitting in probate, had no jurisdiction to make either of the orders whereby the present petitioner was directed to account to the court as a trustee. In the case of *Colburn v. Whitney*, *antè* p. 32, we said (p. 35) that "it must be regarded as definitely settled that a circuit judge sitting in a proceeding essentially 'probate' in character has no authority to appoint a trustee or to compel a trustee, as distinguished from an executor or administrator, to account." If John de Mello, junior, as trustee or otherwise, has money in his hands belonging to the minor children referred to their guardian would be the proper person to demand and receive or recover it, but he could not be compelled to pay the money into court by an order made in a probate proceeding such as we have under review here. The order of March 19, 1917, was void to the extent that it directed John de Mello, junior, to make an accounting.

The cause is remanded to the circuit judge with instructions to set aside that order in so far as it applies to the petitioner herein.

Lightfoot & Lightfoot for petitioner.

Syllabus.

JOHN K. NOTLEY, ANNIE K. NOTLEY, VICTORIA MARIA KEALA VANNATTA, WILLIAM C. VANNATTA AND LILY NOTLEY HEEN *v.* CHARLES K. NOTLEY, ANNIE NOTLEY, WILLIAM K. NOTLEY AND HANNAH NOTLEY.

No. 1006.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 19, 1917.

DECIDED MAY 1, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ. .

FRAUD—*elements—intent.*

A promise, accompanied with an intention not to perform it, and made by the promisor for the purpose of deceiving the promisee and inducing him to act where he otherwise would not have done so, constitutes fraud.

CANCELATION OF INSTRUMENTS—*fraudulent representations.*

Where a parent secured from his children the conveyance to himself of valuable property upon the promise to form a corporation and to transfer the property thus obtained, together with other property owned by him, to the corporation and to prorate the stock in said corporation among those originally owning the property, when he in fact had no intention of fulfilling his promises but used them merely as a pretense to induce his children to execute the deed, equity will come to the relief of the defrauded parties and decree a cancelation of the deed thus obtained.

DEEDS—*undue influence—burden of proof.*

Where the grantors are of mature age and sound mentality the mere fact that they are the children of the grantee does not raise a *prima facie* presumption of the invalidity of the deed from the children to their father thereby casting the burden of showing the fairness of the transaction upon him.

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PLEADING—*defective, aided by absence of demurrer and the introduction of evidence to support.*

A complaint which only inferentially avers a material fact, in the absence of a demurrer and where much evidence is given without objection to sustain the fact improperly pleaded, held, the defect was thereby cured.

OPINION OF THE COURT BY COKE, J.

The complainants John K. Notley, Victoria Maria Keala Vannatta and Lily Notley Heen are the children of respondent Charles K. Notley and Emma Alice Notley, deceased, former wife of Charles K. Notley, and Annie K. Notley is the wife of complainant John K. Notley and William C. Vannatta is the husband of complainant Victoria Maria Keala Vannatta. Respondent Annie Notley is the second wife of Charles K. Notley, and respondent William K. Notley is a son, and the only other child of respondent Charles K. Notley and Emma Alice Notley deceased. The respondent Hannah Notley is the wife of William K. Notley. Emma Alice Notley died in Honolulu January 26, 1914, without having made a will. Her four children above named were her heirs at law and inherited all of her property in equal shares, subject to an estate by curtesy therein of her husband, the respondent Charles K. Notley. Her estate consisted of the family home on Kukui street, city of Honolulu, at which place she died, and of several other tracts of land situated in different parts of the islands, the largest and most valuable tract being lot No. 19, situated at Paauilo, island of Hawaii, containing an area of about 103 acres. All of said land is of the value of about \$20,000. Lot 19, above referred to, is of the value of about \$14,000. Nine days after the death of Emma Alice Notley, to wit, on the 5th day of February, 1914, at Honolulu, the complainants herein executed and delivered to respondent Charles K. Notley a deed conveying all of their interest in the afore-

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said realty owned by the estate of Emma Alice Notley; that on or about the 14th day of May, 1915, this conveyance was signed and acknowledged before a notary public by the respondents William K. Notley and his wife Hannah. This deed was recorded in the office of the registrar of conveyances at Honolulu on the 12th day of July, 1915. On the 9th day of July, 1915, a deed was executed and acknowledged before a notary public by Charles K. Notley and his wife Annie Notley, whereby said lot 19 was conveyed outright to respondent William K. Notley, the consideration therefor, as expressed in said deed, being the sum of one dollar and love and affection.

This is a suit in equity brought for the purpose of obtaining the cancelation of said two deeds and placing all the parties interested in the estate of the said Emma Alice Notley in *statu quo ante*. The bill of complaint represents that respondent Charles K. Notley is a shrewd, scheming, grasping and ambitious man, and that the complainants John K. Notley, Victoria Maria Keala Vannatta and Lily Notley Heen have had little or no experience in matters of business, and up to the time of the alleged fraudulent transaction complained of had placed in the respondent Charles K. Notley implicit confidence and trust, yielding at all times to his parental authority, sagacity and superior judgment. It is further averred in the bill "that, for the purpose of wrongfully depriving your petitioners, John K. Notley, Victoria Maria Keala Vannatta and Lily Notley Heen, of all their right, title and interest in and to the said property so inherited from their mother, the said Emma Alice Notley, deceased, and intending to cheat and defraud your petitioners of all their said right, title and interest in and to the said property and to strip them of their said inheritance, the respondents, Charles K. Notley and William K. Notley, fraudulently combining, conspiring and

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confederating together, and intending so to cheat and defraud your petitioners, did, on February 5, 1914, without any consideration therefor, fraudulently induce and prevail upon your petitioners to make, execute and deliver to the respondent, Charles K. Notley, that certain deed, recorded in the office of the registrar of conveyances aforesaid on the said 5th day of February, 1914, in Book 428, on pages 264, 265 and 266, a copy of which deed is hereunto annexed and marked 'Exhibit A', hereby referred to and made a part hereof, and which deed purports to convey the said property hereinabove described to the respondent, Charles K. Notley; that the said deed was so executed and delivered upon the express understanding and agreement that the respondent, Charles K. Notley, would immediately thereafter proceed and cause to be duly formed, organized and incorporated, under and by virtue of the laws of the Territory of Hawaii, a corporation, same to be known and designated as 'The Notley Estate, Limited;' that the articles of incorporation thereof were to be duly signed and acknowledged by the respondents, Charles K. Notley and William K. Notley, and your petitioners, John K. Notley, Victoria Maria Keala Vannatta and Lily Notley Heen, as the sole incorporators; and that upon the said corporation being so formed, organized and duly incorporated as aforesaid, it was also further understood and agreed by the five persons last above named as incorporators thereof, that the respondent, Charles K. Notley, would then forthwith duly convey all the said property above mentioned and described, together with all his real property, to the said corporation, the shares of stock in which corporation were to be divided and delivered, one-half thereof to the respondent Charles K. Notley, and the other one-half thereof to the respondent, William K. Notley, and your petitioners, John K. Notley, Victoria Maria Keala Vannatta and Lily Notley Heen, in consideration of their respective interests in said

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property so conveyed and to be conveyed, and which understandings and agreements your petitioners believed to be true and they fully relied thereon in making, executing and delivering the said deed as aforesaid, and all of which understandings and agreements, particularly as to the formation of the said corporation by the respondent, Charles K. Notley, the respondents and each of them have wholly and absolutely failed, neglected and refused and still refuse to comply with and perform, and they and each of them also refuse to act, join or participate with your petitioners in any manner whatsoever in the preparation or signing of the articles or any article of incorporation or in the formation and organization of the contemplated corporation, although your petitioners have repeatedly requested them to so act, join and participate with them, and your petitioners have at all times been ready and willing and are now ready and willing to perform their and each of their parts in the execution of the articles of incorporation, as well as in the full and complete formation and organization of the said corporation; and the respondents have also absolutely refused to reconvey to your petitioners their respective interest in and to the said property although they have made demand upon the respondents so to do; that, as a part of the same fraudulent scheme and transaction, and with the same fraudulent intent and purpose to cheat and defraud as aforesaid, on the part of the respondents, that is to say, for the purpose of wrongfully depriving your petitioners, John K. Notley, Victoria Maria Keala Vannatta and Lily Notley Heen, of all their right, title and interest in and to the said property so inherited from their mother, the said Emma Alice Notley, deceased, and intending to cheat and defraud your petitioners of all their said right, title and interest in and to the said property, the respondents further fraudulently combining, conspiring and confederating together, and intending so to cheat and de-

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fraud your petitioners, the respondents, Charles K. Notley and Annie Notley, they well knowing the premises, but intending to so cheat and defraud your petitioners and to aid the respondent, William K. Notley, in so cheating and defrauding your petitioners, did, on July 9, 1915, without any consideration therefor, make, execute and deliver to the respondent, William K. Notley, that certain deed, recorded in the office of the registrar of conveyances aforesaid, on the said 9th day of July 1915, in Book 428 on pages 271 and 272, a copy of which deed is hereunto annexed and marked 'Exhibit B,' hereby referred to and made a part hereof, and which deed purports to convey to the respondent William K. Notley the following described property (same being a portion of said property hereinabove described), to-wit: All that certain piece or parcel of land contained and described in Land Patent (Grant) 5245 and known as Lot No. 19 Public Land Map No. 11, Second Land District and being situate at Paauilo aforesaid; said property so conveyed to and accepted by the respondent, William K. Notley (he well knowing the premises, but intending to cheat and defraud your petitioners), being of about the value of eight thousand dollars (\$8,000.00) and far in excess of his share and interest in the property inherited from the said Emma Alice Notley, deceased."

The answer of the respondents joins issue upon the material allegations contained in the bill of complaint, admitting, however, the execution of the deeds referred to, the separate answer of Charles K. Notley and Annie Notley specifically representing that the complainants, of their own volition and free will and accord, without suggestion, inducement or representation whatsoever on the part of respondent Charles K. Notley, prepared or had prepared the deed of February 5, 1914, which deed was executed, acknowledged and delivered to said respondent, and that

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respondent Charles K. Notley, moved by a generous spirit, conveyed said lot 19 to the respondent William K. Notley, the consideration therein expressed being the love and affection which he bore for his son William.

The case went to trial upon the issues thus formed and a vast amount of evidence was introduced both by the complainants and respondents. The circuit judge rendered a lengthy decision, finally holding that the complainants should prevail and that the deed of February 5, 1914, and also the deed of July 9, 1915, should be delivered up and be canceled and that the respondents reconvey all the property in question so as to place all parties in *statu quo ante*. A decree to that effect was thereafter made and entered. From the opinion and decree the respondents come to this court on appeal.

It is established by the evidence that the respondent Charles K. Notley is a man of about fifty-five years of age and that his four children, herein referred to, have all reached their majority and range from twenty-eight to thirty-four years of age. It appears that up to and for a time subsequent to February 5, 1914, a condition of tranquillity prevailed among them. It is shown that the father of the respondent Charles K. Notley, who died a number of years ago, left a large and valuable estate, but by the provisions of his will had disinherited his son Charles K. Notley; that the elder Notley had so provided in his will that his property should descend to his wife and to his children other than Charles K. Notley, and to the children of Charles K. Notley. It is further shown that Charles K. Notley's mother received from the estate of her husband about a quarter of a million dollars in cash, besides dower rights in real estate, upon the settlement of her husband's estate; that the respondent Charles K. Notley appears to have acquired such an influence and control over his mother that he secured the custody and disposition of the greater part,

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if not all, of her large fortune in cash as well as the income from her realty interests. This fund was dissipated by the respondent Charles K. Notley with astonishing rapidity and completeness and a reckless disregard for the value of money. The fortune of the mother seems to have completely vanished at the time of the death of Emma Alice Notley, Charles K. Notley's wife, and the evidence very conclusively shows that while his wife was lying stricken with a fatal malady respondent Charles K. Notley persisted in his efforts to have her execute a will; that upon the day prior to her death he presented to her a will, already drawn, at the same time importuning her to sign it. There is no evidence of the contents of this will, but in the light of subsequent events its purport can well be imagined. Upon the death of Emma Alice Notley on January 26, 1914, the respondent Charles K. Notley seems to have lost no time in the furtherance of his scheme and intention to acquire the property of her estate. While returning from the cemetery on the occasion of his wife's funeral, in company with complainant John K. Notley and his wife, Charles K. Notley remarked that his wife had died without a will, and on the following morning at the breakfast table, in the presence of his children, he suggested that as Mrs. Notley had died intestate it would be beneficial to the children for them to deed the property inherited from their mother to him and that he would merge or join the same with certain property which he owned of about an equal value and form a corporation, he to take one-half of the capital stock and the other one-half to be prorated among the children. The complainants, having implicit faith and confidence in Charles K. Notley and relying upon his honest intentions and superior judgment, executed the deed on the 5th day of February, 1914. It appears that the deed was drawn by F. J. Testa and acknowledged before Samuel Upa, a notary public, both of whom were present at the execu-

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tion of the deed by the complainants. An unfortunate coincidence is the fact that both of these parties died during the period intervening between the execution of the deed and the hearing of this case before the circuit judge. The evidence, however, as it stands, shows conclusively that both Testa and the respondent Charles K. Notley were present when the deed was executed, and that the same was signed by complainants under their joint direction; that John K. Notley was called first by Testa, who said, "A deed of mother's property," and requested him to sign, adding, "And after that we'll form a corporation." John asked, "After this is all over will he form a corporation?" to which Testa replied, in the presence and hearing of Charles K. Notley, "That's the sole purpose;" then John replied, "With that understanding I will sign," and he did so. The wife of John K. Notley was then called and the same explanation was made to her, whereupon she asked "Where are the other papers?" and Charles K. Notley replied, "Oh, I'll fix that by and by." It appears that John K. Notley's wife was reluctant to sign the deed but finally did so and testified in this connection that she knew Charles K. Notley to be a man of wide experience; that he was always superior in the family and had his way in all family affairs. The two daughters, Mrs. Vannatta and Mrs. Heen, testified in effect to their having signed the deed because of the implicit confidence which they had in their father and upon his express promise that the corporation would be formed by him. It appears that no attorney or outside advice was taken by any of the children nor was it suggested by any one that such advice should be obtained prior to the execution of the deed. The evidence shows that a short time after the 5th day of February, 1914, the deed was delivered by the respondent Charles K. Notley to his son, the respondent William K. Notley, to be taken by him to his home on Maui and there to be executed by him-

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self and his wife and returned to his father. Just what, if any, understanding there was between William and his father is obscure and left largely to inference and deduction. It is amply proven that William, although he denied it, was aware of his father's promise to form a corporation. William, after having retained possession of the deed about a month, was asked by his brother John why he did not sign it, and answered that he had his doubts, further explaining that he did not know that his father would keep his promise about the corporation, then at a later day, in the presence of his sister Mrs. Vannatta and her husband, when urged to sign the deed, he again expressed doubts regarding his father's intention to form a corporation. The fact that both Charles K. Notley and his son William are respondents in this case and both claim all of the property of the estate of Emma Alice Notley by virtue of the deed of February 5, 1914, whereas in the absence of said deed William would be entitled to only one-fourth thereof and his father to a mere curtesy interest therein, apparently causes them to withhold a full explanation of the transactions between them. Whether William in the first instance was in league with his father in the furtherance of a plan to strip his brother and sisters of their interest in their mother's estate is not clear. We think it more likely that he joined hands with his father for this purpose at a later day and only when it appeared to him that he could do so to his own great advantage. He was in possession of an unrecorded deed requiring the signature of himself and his wife to make the same completely effective. His father, the grantee, married the respondent Annie Notley in the month of September, 1914, and was financially embarrassed and was impatiently urging the execution and return of the deed by William and his wife so that he might accept an offer of two thousand dollars for one of the pieces of property included in the deed. It appears that Charles K.

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Notley did not realize that the deed, unexecuted by William and his wife and unrecorded, conveyed to him anything more than an equitable interest in the property, or as he expressed it, constituted more than a cloud upon the children's title thereto. Thus it will be seen that William possessed the whip-handle of the situation. He serenely retained possession of the deed, sometimes expressing his intention not to execute it and at other times representing that he had destroyed it. After holding the deed some fifteen months we find him successfully negotiating with his father for a portion of the property, valued at fourteen thousand dollars, which he did thereupon acquire for the expressed consideration of one dollar and love and affection.

The complainants herein having waited for many months for their father to put into effect his agreement with them to form a corporation, and finally losing faith and confidence in his intention so to do, in October, 1914, transmitted to him a written notice that all tentative agreements, undertakings and documents theretofore entered into by them having for their object the organization of the C. K. Notley Estate, Limited, a corporation, were rescinded and no longer binding upon them. No response was made by Charles K. Notley to this communication and the next active step in the transaction was the execution of the deed of May 14, 1915, by William K. Notley and his wife. William testifies that on the day of the execution of this deed he had an attorney draw a deed from his father and wife to himself conveying lot No. 19 for the reason that he wanted to buy this lot from his father; that a few days thereafter he delivered the executed deed to his father but did not impart to his father the information that he desired to buy lot 19 for the reason that he had not the nerve to do so. He states, however, that having recovered his nerve, on the 9th day of July, 1915, he advised his father of his desire to purchase the lot and his father immediately re-

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plied that he could have it. William had the drafted deed in his pocket and immediately accompanied his father and step-mother to a notary public and the deed was signed, acknowledged and delivered, the consideration expressed being one dollar and love and affection. William took possession of both of the deeds, transmitting the same to the office of the registrar of conveyances and caused them to be recorded, the one to his father being, by William's instructions, recorded a day ahead of the other, and thus the two respondents Charles K. Notley and William K. Notley became possessed of all the property of the estate of Emma Alice Notley, deceased.

The circuit judge seems to have decided this case upon the theory that the complainants should be afforded relief on account of the failure of consideration, and the further ground that undue or dominant parental influence was exercised by respondent Charles K. Notley over complainants at the time of the execution of the deed. The circuit judge found "that the deed of February 5 was executed by the parties plaintiff at a time when they were under the dominant parental influence of defendant Charles K. Notley and the law casts upon him the burden of showing the entire fairness of the transaction and this he failed to do." In so holding the circuit judge was clearly in error. See *Jenkins v. Pye*, 12 Pet. 241; *Sawyer v. White*, 122 Fed. 223; *Turner v. Turner*, 121 Pac. 616; *Towson v. Moore*, 173 U. S. 17. In the latter case Mr. Justice Gray, who delivered the opinion of the court, said: "In the case of a child's gift of its property to a parent the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been an undue influence in procuring it, but it cannot be deemed *prima facie void*."

It is our opinion that where, as in this case, all the parties concerned are of mature age and of sound mentality, the

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mere fact that the grantors are the children of the grantee does not raise a *prima facie* presumption of the invalidity of the deed thereby casting the burden of showing the fairness of the transaction upon the grantee. To defeat a conveyance from a child to its parent something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity; duress or something of that nature must appear; otherwise that disposition of property which accords with the natural inclination of the human heart must be sustained. *Mackall v. Mackall*, 135 U. S. 167. Undue influence was not averred, and in our opinion was not proven. The family relationship merely furnished the opportunity for the commission of the fraud. And the mere failure of consideration is not ordinarily a ground for the cancelation of a deed.

If the complainants are to recover at all they must do so upon the fact established by the evidence that the deed of February 5, 1914, was obtained from them by virtue of the false and fraudulent representations of respondent Charles K. Notley. It must appear that respondent Charles K. Notley, at the time he assured complainants of his intention to form a corporation, as alleged in the bill of complaint, had, in fact, no intention of so doing. This vital question seems to have been entirely overlooked by the trial judge. He made no findings respecting this phase of the case although there was ample evidence to justify him in doing so. It is true that the bill of complaint does not specifically allege that respondent Charles K. Notley had no intention of forming a corporation at the time he promised to do so and had respondents demurred to the complaint the question thus raised would likely have been disposed of favorably to them. But in the absence of a demurrer, and the fact that the complaint contains inferential averments of the fraudulent purpose of respondent Charles K. Notley, and in view of the further fact that much evi-

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dence was admitted, without objection, tending to prove such fraudulent purpose, we are of the opinion that the defect in the pleadings was cured thereby. "An express averment of intent (to defraud) is not required, but it is sufficient if the existence of the intent can be clearly inferred from the allegations." 20 Cyc. 101. See also *County of Hawaii v. Purdy*, 22 Haw. 272.

The failure of the trial judge to make any findings upon the subject compels us to do so and we therefore find from the evidence that at the time respondent Charles K. Notley promised complainants herein that he would form a corporation for the purposes and under the circumstances alleged in the bill of complaint, that he did so with a premeditated design to cheat, defraud and deceive the complainants and that he had no intention at the time of performing or fulfilling the promises, but used them merely as a false pretense to induce the complainants to execute the deed. It was clearly proven that the respondent agreed to form a corporation and to convey to it the property in question. That promise was the real consideration and inducement for the conveyance. It appears that on two or three occasions he spoke in a casual way about forming a corporation but he took no step toward forming one, and in his answer and upon the witness stand he positively denied having made the promise. In the meantime he conveyed a portion of the property to his son William. "To profess an intent to do or not to do when the party intends the contrary is as clear a case of misrepresentation and of fraud as could be made." Bigelow on the Law of Fraud, 484.

"As a general rule, in order for false representations to be the basis of fraud, such representations must be relative to existing facts or facts which previously existed and cannot be founded upon promises as to future acts. There is, however, the exception to the foregoing rule, that if the promise is accompanied with an intention not to perform it and is made for the purpose of deceiving the promisee and

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inducing him to act where otherwise he would not have done so, the same constitutes fraud." *Blackburn v. Morrison*, 29 Okl. 510. See also *Donaldson v. Farwell*, 93 U. S. 631, and *Chicago T. & M. C. Ry. Co. v. Titterington*, 84 Tex. 218.

Having found from the evidence before us that the deed from complainants to Charles K. Notley was secured through fraud and misrepresentation on the part of Charles K. Notley, as herein set out, it follows that equity will afford relief to the complainants.

What, if any, connection respondent William K. Notley had with the transaction at the outset is left to conjecture, but the evidence directly connects him at a later day with his father's scheme to defraud the complainants and discloses his participation in the fruits of a transaction which he knew was fraudulent.

"The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. 'A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud.'" 2 Pomeroy Eq. Jur., Sec. 918.

While the trial judge erred in his theory of the case the ultimate result of his conclusions was correct. "The decision of a circuit judge cannot be reversed because he gave wrong reasons, provided he came to a correct conclusion." *Calaca v. Caldeira*, 13 Haw. 214.

The decree appealed from is affirmed.

J. T. DeBolt for complainants.

C. S. Davis (*Frank Andrade* with him on the brief) for respondents.

Syllabus.

NETTIE L. SCOTT v. ESTHER N. PILIPO AND
ELIZABETH K. PILIPO.

No. 1012.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MAY 7, 1917.

DECIDED MAY 16, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

JUDGMENTS—*res judicata*—*landlord and tenant*.

A judgment for the plaintiff in an action between lessor and lessee to recover rent in which the defense of eviction was unsuccessfully asserted by the defendant is not a bar to a subsequent action by the lessee to recover damages based on failure of performance and of the consideration because of the inability of the lessee to obtain possession of the demised premises.

LIMITATION OF ACTIONS—*continuing contract*—*lease*.

The statute of limitations begins to run against a right of action for damages for failure of performance and of the consideration of a continuing contract, not upon the first breach or failure, but from the time when the plaintiff elected to disaffirm the contract. The rule applies to a lease of land where the lessee has been unable to obtain possession.

DAMAGES—*continuing contract*—*period of limitation*.

In an action for damages for failure of performance or of the consideration under a continuing contract, upon its disaffirmance, the recovery is limited to such injury as occurred within the period of limitation.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a reappearance of the case which is reported *ante* p. 349. The plaintiff claimed damages for breach of the covenant for quiet enjoyment contained in the lease entered into between the parties on August 21, 1894. It was held that a demurrer to the complaint was properly sustained on two grounds, namely: That it was not made to appear that the persons who, it was alleged, had prevented the plaintiff from

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obtaining possession of the demised premises claimed title under or through the lessors, or possessed a superior title to the land; and, that as the only breach alleged in the complaint occurred more than six years before the commencement of the action, the right of action was barred by the statute of limitations. Thereafter the plaintiff obtained leave in the circuit court to amend, and a second amended complaint was filed. The new complaint contained two counts, the first of which declared again upon the express covenant for quiet enjoyment. It obviated the first ground above stated for the sustaining of the demurrer to the original complaint by alleging that the plaintiff was prevented from obtaining possession of the premises by "tenants by sufferance or at will of lessors." The time when the breach occurred (September 1, 1894) remained the same, however, and the situation with respect to the statute of limitations, as heretofore ruled on, is unchanged. As it has been stated on behalf of the plaintiff that her claim is now sought to be maintained in disaffirmance of the lease and not upon its covenant, we take it that the first count is virtually abandoned and that no further reference to that count need be made.

In the second count it was alleged that "because of said hitherto total failure and neglect of lessors to make the demised premises available to lessee, plaintiff now elects to rely no longer on performance by lessors, but to treat said failure as entire, and to treat said lease as terminated, and under the obligations implied from said contractual relations to claim damages" etc. It was alleged that during the first five years of the term the lessee paid rent in the sum of \$1590; that on January 2, 1914, she paid a judgment obtained against her by the defendants in an action for rent which, with costs of defending the action, amounted to the sum of \$2551.65; that on June 25, 1915, and on November 4, 1915, the defendants obtained judgments in further actions

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for rent in the sums of \$1992.73 and \$761, which judgments, though not paid, are "incontestable and will have to be paid." Those several sums, with interest, and the further sum of \$2500, the alleged value of the unexpired term of the lease, the plaintiff prays to recover as damages in this action. The court below overruled a demurrer and a plea in bar filed by the defendants, and the case is here upon an interlocutory bill of exceptions allowed by the circuit judge.

The amended complaint was filed evidently without objection on the part of the defendants. A demurrer was interposed demurring generally to the amended complaint and setting up the statute of limitations. And as, for reasons which will be stated, we think the second count set forth a cause of action, we hold that the demurrer was properly overruled.

The defendants' plea in bar set forth that in the actions for rent referred to in plaintiff's complaint the defendant set up and undertook to prove in defense of the actions an actual eviction from a part or the whole of the demised premises and that the issue was in each case determined adversely to the defendant, the plaintiff herein. No issue appears to have been joined upon the plea in bar, but some sort of a hearing was had and the plea was overruled. Assuming that it was proven or admitted that in the actions for rent the defense of eviction was unsuccessfully set up, it does not follow that the plaintiff may not maintain the present action for, as shown in *Pilipo v. Scott*, 21 Haw. 609, the defense of eviction may have failed for the very reason that the lessee had never obtained possession of the demised premises or the part as to which eviction was claimed. Under the second count of her amended complaint the plaintiff claims damages for alleged failure of performance on the part of her lessors resulting in the inability on her part to obtain possession of the premises, but in disaffirmance of the lease. This is a new right of action as-

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serted now for the first time, and the plea in bar does not show that the issue has heretofore been litigated between the parties, or that it could and should have been litigated in the former actions. In *Scott v. Pilipo*, 21 Haw. 766, the plaintiff sought an injunction to restrain the enforcement of a judgment in an action for rent, averring that she had at no time been able to obtain possession of any of the demised land. This court held that the fact relied on was available in defense to the claim for rent, and that the failure to assert the defense not being due to any fraud or fault of the plaintiffs in the action the complainant was not entitled to the relief prayed for. But if, upon a trial upon the merits of the present case, the plaintiff should prove her allegations she will be entitled to recover at least nominal damages and be relieved from further liability for rent. "Where possession of the demised premises is withheld from the lessee, he may maintain an action of ejectment against any person, including the lessor, who so wrongfully withholds the possession from him; or if possession is withheld by the lessor, or one claiming under him, the lessee may at his option repudiate the contract, or bring an action for damages against the lessor for a breach of his agreement." 24 Cyc. 1051, 1052.

In an action for breach of a covenant for quiet enjoyment the rent paid in advance and the value of the unexpired term over and above the rent reserved may be recovered. *Ante* p. 354. But where, as here, the contract is repudiated on failure of consideration or performance the measure of damages is generally the amount of money which has been paid under it, with interest. See *Kopelman v. Gritman*, 136 N. Y. S. 296; *Goldman v. Dieves*, 159 Wis. 47, 50; *Riverside Co. v. Husted*, 109 Va. 688; *Tyler v. Bailey*, 71 Ill. 34. The question whether any recovery can be had in respect of the amounts for which judgments were recovered, since the validity of the judgments is conceded

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and the facts now alleged could have been used in defense of those actions, was not raised by the plea in bar and is not now before us.

The application of the statute of limitations differs also in the two classes of cases. An action for damages for the breach of covenant must be brought within six years from the date on which the breach occurred, whereas an action which proceeds in disaffirmance of the contract may be commenced within six years of the date of its repudiation by the plaintiff. And the repudiation need not occur immediately upon breach but may be made at any time during the continuance of the contract. The defendants in this case cannot say that the lease is not in force for they have continued to demand rent under it. We think the rule applicable to the failure of performance under a continuing contract applies here, and that the statute has not run against the action based, as it is, on the disaffirmance of the contract as the disaffirmance has only just now been made, though the recovery would be limited to damages sustained within the period of limitation. See 25 Cyc. 1104, 1106; *Richter v. Land Co.*, 129 Cal. 367, 375; *McCay v. McDowell*, 80 Ia. 146; *Nelson v. Traction Co.*, 142 S. W. (Tex.) 146; *Whitley v. Whitley*, 80 S. W. (Ky.) 825.

The continuous litigation between these parties with respect to this lease and their rights under it has taxed the patience of this court. It is high time that those rights were settled and the litigation brought to an end. The disadvantageous and complicated nature of the plaintiff's tenancy has been adverted to in prior decisions of this court, but this case seemingly presents an opportunity which, if taken proper advantage of by the litigants, may enable the court to decide all disputed facts and definitely pass upon the legal questions involved.

The exceptions are overruled.

M. F. Scott for plaintiff.

E. K. Aiu and *N. W. Aluli* for defendants.

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LEWERS & COOKE, LIMITED, v. JOE FERNANDEZ
AND IDA W. WATERHOUSE.

No. 997.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED MAY 8, 1917.

DECIDED MAY 16, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

MECHANICS' LIENS—*demand—pleading and proof.*

In an action to enforce a lien for materials furnished and used in the construction of a building, demand upon the owner for payment of the amount claimed under the lien is, under the provisions of section 2867 R. L., a condition precedent to bringing the suit, and such demand must be alleged and proven.

DISMISSAL AND NONSUIT—*mechanics' liens—demand.*

Where in an action to enforce a lien under chapter 162 R. L. for materials furnished and used in the construction of a building it is not shown that demand for the amount claimed under the lien was made upon the owner prior to commencing the action, a motion for judgment of nonsuit on that ground should be sustained and the action dismissed as to the defendant owner.

OPINION OF THE COURT BY QUARLES, J.

The defendant Fernandez (hereinafter called the contractor) constructed under contract a residence and servant's quarters for his co-defendant Waterhouse (hereinafter called the owner) upon certain premises situated in Honolulu. The plaintiff sold and furnished to be used in the construction of said buildings certain materials, and which were used in constructing the buildings. The contractor failing to pay for the materials so furnished by it, plaintiff filed a notice of lien under the provisions of chapter 162 R. L., served a copy of the notice of lien on the de-

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fendant owner, after which it commenced this action to enforce its lien on the premises upon which the said buildings are located. The trial court found in favor of plaintiff and judgment was entered as prayed for in the complaint. The case comes before us upon numerous exceptions, but under the conclusion we have reached it will not be necessary to pass upon all of them. At the trial the plaintiff was permitted to amend its complaint by adding an allegation that the said owner "contracted with the defendant Joe Fernandez for the erection of said buildings and structures." Thereupon the defendant owner filed a demurrer to the complaint as amended upon the ground that the amended complaint does not state facts sufficient to constitute a cause of action nor entitle plaintiff to the relief demanded, specifying among other particulars, that it does not appear from said amended complaint that any demand was made upon the defendants. The demurrer was overruled and the defendant owner excepted. The evidence failed to show that any demand was made upon the owner for the amount claimed in the notice of lien and when plaintiff rested its case the defendant owner moved for judgment of nonsuit upon various grounds, the sixth being as follows: "That it does not appear that any demand for the amount, either in whole or in part, for which the lien is claimed by the plaintiff, was ever made by the alleged lienor, plaintiff herein, to the owner, Mrs. Waterhouse." The motion for nonsuit was denied and the defendant excepted.

Section 2867, found in chapter 162 R. L., provides, among other things: "The liens hereby provided may after demand and refusal of the amount due, or upon neglect to pay the same upon demand, be enforced by proceedings in any court of competent jurisdiction, by service of summons, as in other cases." Section 2864 R. L. requires that a notice of lien be filed and served upon the owner. Sections 2865 and 2866 R.L. relate to keeping records of liens of mechanics and material-

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men and to priorities of such liens. Section 2868 provides that the owner, when a lien is filed, may retain from the amount payable to the contractor sufficient to cover the lien. These statutes relate to the duties, obligations and rights of the owner and not to those of the contractor.

It is urged upon behalf of the plaintiff that the demurrer was properly overruled; that the motion for a nonsuit was properly denied; and that the decision in favor of plaintiff and judgment for the enforcement of its lien were proper as demand upon the owner was not necessary, service of a copy of the notice of lien upon the owner being sufficient under these various statutes. We are unable to agree with this contention but take the view that under the provisions of section 2867, *supra*, that after the notice of lien is filed and copy thereof served upon the owner demand upon the owner for the amount claimed under the lien is a condition precedent to bringing suit for its enforcement, and the fact of making such demand must be alleged and proven. To hold otherwise would be to eliminate material terms of the statute. The object and purpose of these statutes is to provide protection to one who furnishes labor or materials used in the construction of a building which he may have enforced upon certain conditions precedent, one of which is demand for payment upon the owner of the building. Looking at the purpose and intent of these statutes there is no doubt that the person upon whom demand must be made before commencing an action is the owner of the building or structure upon which the lien is claimed. "A cause of action is often dependent upon a demand being made. Where this is so the complaint must allege demand." 4 Ency. Pl. & Pr. 612. The general rule as to alleging the performance of a condition precedent is stated as follows: "When a specific act is to be done by the plaintiff, or any number of acts, by way of condition precedent, he must

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show in the pleading precisely what he has done by way of performing them." 4 Ency. Pl. & Pr. 632.

The exceptions to the refusal to grant the motion of defendant for a nonsuit and to the decision and judgment against the defendant owner are sustained and the cause is remanded to the circuit court with instructions to set aside the order denying appellant's motion for a nonsuit, to set aside the judgment against the appellant and to enter judgment of nonsuit in favor of the defendant owner.

A. L. Castle and Marguerite Ashford (Castle & Withington and Marguerite Ashford on the brief) for plaintiff.

E. C. Peters for the defendant Waterhouse.

HELEN K. KINNEY v. OAHU SUGAR COMPANY,
LIMITED.

No. 1005.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED MAY 14, 15, 1917.

DECIDED MAY 28, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

WILLS—construction—technical words.

The technical meaning of words used in a will may be subordinated to the real intent of the testator, but the presumption is that technical words were used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary.

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WORDS AND PHRASES—"heirs of the body."

The phrase "heirs of the body" is the ordinary, proper and technically accurate one to use in the creation of an estate in fee tail.

SAME—"limited."

The word "limited," when used with reference to the creation of an estate in real property, means "defined."

ESTATES—estate in fee tail—construction.

A testatrix devised land to K and K, her husband, "unto them and to the heirs of the body of either" and "upon default of issue" to trustees appointed by the will. Held, that the testatrix intended to devise to K and K an estate in fee tail, and that, as estates tail cannot exist in Hawaii, the devise took effect as an estate in fee simple in K and K, it not appearing that a life estate in K and K with remainder to the heirs of the body of either would more nearly carry out the intention of the testatrix.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a writ of error to review the judgment of the circuit court of the first circuit in an action of ejectment to recover a tract of land situate at Hanohano, district of Ewa, city and county of Honolulu. The case was tried jury waived, and judgment was rendered in favor of the defendant.

The plaintiff claimed title to an undivided one-third of the land as one of the heirs of the bodies of Kahakuakoi and Kealohapauole, devisees under the will of the late Bernice Pauahi Bishop, and as heir of a deceased brother. There was evidence that Kahakuakoi and Kealohapauole had three children, Niulii, George and Lydia; that Niulii died in 1890, leaving two children, Helen (the plaintiff) and John Paalua; that Kahakuakoi and Kealohapauole died respectively in 1910 and 1914; and that John Paalua died in 1915. It further appeared that the land was mortgaged on December 15, 1890, by Kahakuakoi and Kealohapauole to Bishop & Company, bankers, and was sold under foreclosure of the mortgage on January 28, 1893. Through mesne conveyances

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the defendant claims title under the foreclosure deed, and also by adverse possession. On October 22, 1894, Kahakuakoi, Kealohapauole and George and Lydia Kealohapauole executed a deed of all their right, title and interest in the land to the defendant's grantor for a nominal consideration. In the trial court the two principal questions were, one of fact, whether the plaintiff had proven her alleged heirship, which, upon conflicting testimony, was decided in her favor, and one of law, whether she took any estate in the land under the provisions of the will, which was decided against her. This court has only to deal with the question of law. The case has been thoroughly and elaborately briefed and ably argued, but much of the discussion has been of an academic nature and seems not to require attention in all its many phases.

The testatrix died October 16, 1884. In the fifth paragraph of her will she said "I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of Thirty Dollars (\$30) per month, (not \$30 each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed." The clause was modified in the eleventh paragraph of the first codicil to the will, as follows: "I revoke so much of my said will as devises the land known as 'Mauna Kamala' to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."

On behalf of the plaintiff in error (also plaintiff below) it is contended (1) that at common law the devise would

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not create a fee tail general or a fee tail at all in Kahakuakoi and Kealohapauole, but contingent remainders in the heirs of the body of either vesting at death, and in default of heirs of the body of either, then to the trustees; (2) that in Hawaii, even if the devise created a fee tail at common law, this is to be construed as a fee simple, or an estate for life with remainder over, according as such construction will carry out more nearly the intent of the testator drawn from the will and the surrounding circumstances; (3) that the cases of *Nahaolelua v. Heen*, 20 Haw. 372, and *Boeynaems v. Ah Leong*, 21 Haw. 699, settle the law in Hawaii, that even if a devise or a deed creates at common law a fee tail, if it appears that the testator or the grantor had in mind some benefit for the heirs of the body, the devise or grant will be construed as a life estate in the first taker and remainder over; (4) that the use of the words "of either" and the devise over in default of issue, meaning heirs of the body of either, show that, in the mind of the testatrix, the heirs of the body of either were to take an interest, as they cannot take by descent, they must take by purchase, which would require under the decision in the *Nahaolelua* case, a holding that the estate created by this will is a life estate by the entirety with remainder over to the heirs of the body of either; (5) that it will be presumed that the testatrix intended to create a legal estate, rather than an illegal one—a devise for the life of the first takers, rather than a fee tail which cannot exist in this Territory; and (6) that the construction contended for is reenforced by the use of the word "limited" in the codicil, especially if the devise to the first takers creates a fee simple, for then the devise over is a conditional estate dependent on the defeasance of the fee simple already given.

On behalf of the defendant in error it is contended (1) that the words "heirs of the body of either" are words of inheritance and, not of purchase, and the estate would be

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a fee tail at common law, and also in Hawaii, if fees tail could exist here; (2) that where, as in this Territory, fees tail do not exist, a fee tail, in the absence of controlling words to the contrary, would be a fee simple; (3) that it was the intention of the testatrix to create an estate of inheritance, and not a life estate and remainders; (4) that the word "either," the gift over "upon default of issue," the will and codicils taken as a whole, and legal presumptions, all tend to support that view; and (5) that the intention of the testatrix can better be met by a holding that Kahakuakoi and Kealohapauole took title in fee simple, than that they took for life only. The claim of title by adverse possession, and the contention that the defendant has at least the right of possession for a term of years under a lease made by Kahakuakoi and Kealohapauole for fifty years from January 1, 1892, under the view we take of the case, need not be considered.

The will and codicils were drawn with much care and accuracy of expression. It appears from the record in the proceeding for the probate of the will which is in evidence in this case that they were drafted by Francis M. Hatch, at one time a justice of this court, but the language used must, of course, be regarded as that of the testatrix herself. It is obvious that the testatrix knew how to express an intention to create a life estate and remainder, as well as to devise in fee simple. Thus, in the fourth paragraph of the will, there was a devise of land to L, "to have and to hold for and during the term of her natural life; and after her decease to my trustees upon the trusts below expressed." There were a number of such life estates given by the will and codicils. In the ninth paragraph of the first codicil there was a devise of land and a fishery to D, "to have and to hold with the appurtenances to him, his heirs and assigns forever." In the fifth paragraph of the first codicil there was a devise of land to K and H, his wife, "to have and to hold

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for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees upon the trusts named in my said will." It would seem, then, that in devising the land in dispute to Kahakuakoi and her husband "unto them and to the heirs of the body of either," and "upon default of issue" to the trustees, the testatrix intended to create an estate other than a fee simple, or a life estate or estates and remainders. What was it? No authority exactly in point has been found.

The word "heirs," though it may be and sometimes is used as a word of purchase, is primarily, ordinarily, and in a strict technical sense, a word of limitation denoting an estate in fee simple. 40 Cyc. 1574; 2 Jarman on Wills (6th ed.) 69; *Thurston v. Allen*, 8 Haw. 392, 402; *Ninia v. Wilder*, 12 Haw. 104, 108; *Iuko v. Holt*, 9 Haw. 88, 91. And, at common law, after the enactment of the statute *de donis conditionalibus* in 1285, the phrase "heirs of the body" was the ordinary, proper and technically accurate one to use in the creation of an estate in fee tail. 2 Jarman, *supra*; *Rooke v. Queen's Hospital*, 12 Haw. 375, 390; *Nahaolelua v. Heen*, *supra*, at p. 376. In *Pearsol v. Maxwell*, 68 Fed. 513, where there was involved a devise to one and "the heirs of her body," and a contention was advanced for a life estate and remainder, the court said, "These are the aptest words for the creation of an estate tail. Standing alone, they would admit of no other interpretation." And that they "are strictly and technically words of limitation." And in the same case on appeal the court said, "that these words, if alone considered, created an estate tail, is horn-book law." 76 Fed. 428. The technical meaning of words used in a will may be subordinated to the real intent of the testator, but the presumption is that technical words were used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary. 40 Cyc. 1398; *Land Co. v. Barker*, 60 So. (Ala.) 157; *Morse v.*

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Ballou, 90 Atl. (Me.) 1091; *King v. Johnson*, 83 S. E. (Va.) 1070; *Lane v. Dillon*, 85 S. E. (S. C.) 369; *Black v. Jones*, 264 Ill. 548, 555. "It is a well settled rule of construction, that technical words of limitation used in a devise, such as *heirs* generally, or *heirs of the body*, shall be allowed their legal effect, unless from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise. Or, to use the language of Lord Eldon, in *Wright v. Jesson*, 2 Bligh 1, the words *heirs of the body* will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expression showing the particular intent of the testator, but that must be clearly intelligible and unequivocal." *Clarke v. Smith*, 49 Md. 106, 117. We must hold, therefore, that the intention of the testatrix was to create in the devisees an estate of inheritance—an estate in fee tail—unless we find words in the will which clearly show that the testatrix meant something else.

It is contended that the use of the words "of either," the devise over upon default of issue, the word "limited" in the phrase in the codicil, "to have and to hold as limited in said fifth article of my said will," and the fact that the annuity given by the fifth paragraph of the will was for the life of the annuitants and the survivor of them merely, tend to show an intent on the part of the testatrix that the devise of the land was to be for life only in the first takers. It is argued that the words "of either" in the phrase "and to the heirs of the body of either," would prevent Kahakua-koi and Kealohapauole from taking more than a life estate because each of them might have left heirs, not of their joint bodies, who could not take by descent from the other spouse and, hence, could take only as purchasers. And so it is urged that, in order to carry out the apparent intention, the estate in the first takers must be held to be an estate by the entirety for life, and those of the heirs of the

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body of either remainders. The first takers, being husband and wife, presumably took by the entirety. *Robinson v. Aheong*, 13 Haw. 196. The statute (R. L. 1915, Sec. 3132) providing that all grants and devises of land to two or more persons shall, unless it manifestly appears to have been otherwise intended, be construed to create estates in common, does not apply here since it was enacted after the will took effect. But we think the conclusion reached by counsel is not sound. The word "either" does not refer to the first takers or necessarily affect the estate devised to them. It relates only to the inheritance. There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances. 2 Jarman on Wills (6th ed.) 267; *Ex parte Tanner*, 20 Beav. 374, 52 Eng. Rep. 647; *Doe v. Green*, 4 M. & W. 229, 150 Eng. Rep. 1414. And we see no reason why the principle should not apply in the case of an estate by the entirety in tail. It is really of no practical importance in this case whether the first takers be regarded as having been tenants by the entirety, joint tenants or tenants in common, and as this case does not involve a controversy between two different sets of heirs of the first takers it is a matter of academic interest only as to how the heirs of one spouse who were not also heirs of the other, had there been such, would have taken. We think, however, that the contention of counsel for the defendant in error that without the words "or either" the descent would have been limited to the heirs of the joint bodies of the first takers, thus creating an estate tail special, and that that word was used to express the intention to create an estate tail general is sound. Under this theory the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse. It is to be noted, in this connection, that in the clause in question no words of separation or futurity were used to draw a line of demarcation between the estate of the first takers and

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that of the heirs. The devise over to the trustees upon default of issue does not militate against the theory of an estate of inheritance. It is not only feasible to limit a remainder after an estate tail upon failure of issue, but, in order to complete the testamentary disposition, is the natural thing for a testator to do. We think the use of the word "limited," in the codicil, does not support the claim of the plaintiff in error. As said in Anderson's Law Dictionary, " 'To limit' an estate is to define the period of its duration. The words employed are thence termed 'words of limitation,' and the act itself 'limiting' the estate." Bouvier says the limitation of an estate is "The definition or circumscription, in any conveyance, of the interest which the grantee is intended to take." 2 Bouv. L. Dict. (3d ed.) 2021. The word "limited" is often used in the sense of "defined," and was so used in the clause referred to. By the provision in the codicil the testatrix meant, and clearly said, that she gave to Kahakuakoi and Kealohapauole, in lieu of the devise contained in the fifth article of the will, the same estate in the land known as Hanohano as, by said article, she had given to them in the land called Mauna Kamala. Nor do we think the fact that the annuity was given to the same devisees for their lives and that of the survivor throws any light on the intention of the testatrix with reference to the devise of the real estate. If, instead of the gift of the annuity, there had been a devise to the same parties of an express life estate in another piece of land, it could not have been held that it pointed to an intention to create a similar estate in the land of Hanohano. On the contrary, the difference in phraseology would have indicated an intent to create different kinds of estates. We conclude, therefore, that there is no language in the will which shows that the testatrix used the words "heirs of the body" in any other than their usual and technical sense. On the other hand, there is affirmative evidence tending to show that the

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testatrix did not mean that Kahakuakoi and Kealohapauole were to have an estate for life only. In every instance where the will expressly created an estate for life the remainder was devised to the trustees, and there was a provision in the first codicil that "I hereby give the power to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent however, after such decease to be paid to my executors or trustees." That provision tends to show that the testatrix did not intend to give an estate in remainder to the heirs of the bodies of Kahakuakoi and Kealohapauole, and is strongly indicative of an understanding on her part that in every case where a life estate had been devised the remainder over was given to the trustees.

The rule is invoked that in case of doubt a testator will be presumed to have intended a legal estate rather than an illegal one. And it is urged that as fees tail cannot exist in this jurisdiction it should be presumed that Mrs. Bishop did not intend to create an estate in fee tail by the devise in question. The presumption does not operate with much force in the case at bar since an impression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here, and there was no reported ruling to the contrary till the case of *Rooke v. Queen's Hospital* was decided in 1900. In a jurisdiction where fees tail have been abolished the courts would be slow to construe a will executed after the abolition as intending to create such an estate. Such an intention would not be implied. But where the language used in a will shows unmistakably that such was the intention or attempt of the testator the courts cannot do otherwise than recognize the fact and give such

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effect to it as they may under the law. As to the will in hand we have no doubt as to what the testatrix intended.

It is definitely settled that an estate tail cannot exist or be created in this Territory. *Rooke v. Queen's Hospital, supra*; *Nahaolelua v. Heen, supra*; *Boeynaems v. Ah Leong, supra*. In the absence of statute, what is the proper course for the court to pursue in a case like this? The ruling in *Nahaolelua v. Heen* was to the effect that the attempt to create a fee tail may be given the effect of creating either an estate in fee simple in the first taker, or a life estate in the first taker and a remainder in fee simple in the issue, according to whether the one effect or the other will go more nearly towards carrying out the intention of the grantor or testator in each case. The other alternative would be to hold the entire grant or devise to be void. But that course has not been adopted here or elsewhere. Here, the plaintiff in error contends for a life estate and remainder on the ground that the will shows an intention on the part of the testatrix to benefit the heirs of the body of the first takers, and, further, because the testimony in the case shows that the plaintiff's grandmother was a cousin of the testatrix, and that the testatrix showed a personal interest in the plaintiff's mother and a practical interest in the welfare of the plaintiff herself. There is nothing in the will, however, beyond the mere limitation to the heirs of the body to indicate that the testatrix intended any benefit to the heirs of the first takers, and, as a futile attempt to create an estate in fee tail is not to be held in every case to create a life estate and remainder, it does not afford a sufficient reason for so holding in the present case. The case of *Nahaolelua v. Heen* involved the construction of a deed. It there appeared that on August 10, 1871, one Elizabeth K. St. John, the mother of the plaintiffs, in contemplation of marriage, conveyed certain land to trustees to hold upon trust for the use of the trustor until her marriage to

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one Huakini; to pay the net income to her, after marriage, during her coverture with Huakini; to, in case of her death after marriage and during the lifetime of her husband, leaving issue of the marriage, apply the net income to the maintenance of such issue during minority; and, upon such issue obtaining majority, to convey the land to them. On September 13, 1873, the trustees executed the deed which required construction. It recited the execution of the prior deed, the marriage of the parties, and the birth of a son; and stated the consideration to be the marriage, the birth of the child, the special request of the grantee, and the payment of one dollar. It conveyed the land to the said Elizabeth Huakini, "and the heirs of her body forever." The deed contained a provision which it was held should be disregarded as being repugnant to the grant, but which, since it was held that the deed attempted to create an estate tail, and that estates tail do not exist in this Territory, could properly be taken into consideration in connection with the question as to how best to approximate the intention of the party, as follows: "In special trust for the use and benefit of her son Edward Nahonoomaui Kia, and such other child or children as may hereafter be born to her, and his or their heirs and assigns forever as he or they shall arrive at the age of legal majority." After referring to the rule that the intention of the parties to a deed is to be ascertained and given effect to if practicable, the court said, "Applying this rule, it is apparent that the intent of the parties to the deed of September 13, 1873, will be most nearly carried out by holding that Elizabeth should take a life-estate, with remainder in fee simple to the plaintiffs, 'the heirs of her body.' This view gives effect as nearly as possible to those formal parts of the deed usually regarded as being sufficient, under the law, to pass title." The decision was followed in *Boeynaems v. Ah Leong*, supra, where the same deed was involved, without further

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discussion, and that case, in turn, was affirmed by the Supreme Court of the United States, without opinion. The facts in the *Nahaolelua* case were unique, and we think the case was rightly decided; but, except that they included an attempt to create an estate in fee tail, they bear no resemblance to the facts in the case at bar. We reaffirm the ruling made in that case that, in this jurisdiction, when a futile attempt has been made to create an estate in fee tail it will take effect either as a fee simple or a life estate and remainder according to which appears to more nearly effect the intention of the grantor or testator, and hold, further, that ordinarily it will be held to take effect as a fee simple unless something appears which should send it the other way. Whether the court could go beyond the language of the will and consider the extrinsic testimony as to surrounding circumstances need not be decided as, in our opinion, the testimony referred to in this connection throws no light on the subject. What the testatrix might have done had she been advised that she could not create an estate tail is left to conjecture. There is nothing tending to show a preference for a life estate and remainder.

In a jurisdiction where fees simple conditional, but not fees tail, are recognized an unsuccessful attempt to create an estate in fee tail might take effect as a fee simple conditional. See *Archer v. Ellison*, 5 S. E. (S. C.) 713; *Pierson v. Lane*, 60 Ia. 60. But it was pointed out in *Rooke v. Queen's Hospital*, *supra*, at p. 394, that, for the same reasons that estates tail have no place under the laws of Hawaii, fees simple conditional cannot exist here. In *Jewell v. Warner*, 35 N. H. 176, the court, after showing that the statutes of New Hampshire relating to wills and the descent of property were irreconcilable with the statute *de donis* and repugnant to the nature of estates tail, said (p. 185), "The restrictive words added to 'heirs' 'of the body,' or 'male or female of the body,' or 'by the body of any particu-

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lar wife or husband,' are simply inoperative. They create neither an estate tail nor a fee simple conditional, but an estate in fee simple, as if they had been entirely omitted." See also *Merrill v. Baptist Union*, 73 N. H. 414. In *Calder v. Davidson*, 59 S. W. (Tex.) 300, 302, where the court had before it a deed conveying land to "Mary Walker Calder and the heirs of her body by the said R. J. Calder," it was said, "At the common law the language would have created a fee tail special, and, since estates tail are forbidden in this state, the deed must be held to have vested a fee simple title in the first taker." And see *Rowland v. Warren*, 10 Ore. 129. In a jurisdiction where estates tail in real property cannot exist the situation, where there has been an attempt to create such an estate, is somewhat analogous to that where there has been an attempt to create an estate tail in personal property, and, in that case, it is held that the party will take an absolute interest in the property. 10 R. C. L. 657; *Elton v. Eason*, 19 Ves. Jr. 73; *Smith's Appeal*, 23 Pa. St. 9. We take the view that where it does not appear that in the particular case a life estate and remainder would more nearly comply with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind the attempted fee tail should take effect as a fee simple in the first taker. This, because both are estates of inheritance, and belong to the same genus; both, at common law, were subject to the incidents of dower and curtesy, and were without impeachment of waste; the tenant in tail could bar the entail; an estate tail, in point of law, bears little resemblance to a life estate and remainder; and the law generally favors the first taker. In short, in such a case as this, a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail.

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We hold that Kahakuakoi and Kealohapauole took under the will and codicil an estate in fee simple in the land in dispute, and that the plaintiff has no interest therein.

The judgment of the circuit court is affirmed.

D. L. Withington (*Castle & Withington* and *W. C. Achi* on the brief) for plaintiff in error.

W. F. Frear and *J. W. Cathcart* (*Frear, Prosser, Anderson & Marx* and *Thompson, Milverton & Cathcart* on the brief) for defendant in error.

TOKINO YOSHIURA v. M. SARANAKA.

No. 1015.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MAY 21, 1917.

DECIDED JUNE 2, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

TRIAL—*evidence—cross-examination of witness.*

While the trial court may permit the defendant on cross-examination of a witness to go into the merits of his defense by inquiring into matters not testified to by the witness on direct examination, it is better practice not to permit him to do so.

APPEAL AND ERROR—*stating reasons for decision.*

A general finding that plaintiff should recover a certain sum of money from defendant and that defendant has failed to make out his alleged defenses of want of consideration and set-off or counter-claim and that plaintiff has established her case as alleged in her complaint by a preponderance of the evidence does not comply with the provisions of section 2380 R. L. which requires the trial court in a jury-waived case to state in its decision the reasons therefor, and the failure to state such reasons is reversible error.

OPINION OF THE COURT BY QUARLES, J.

This is an action in assumpsit upon a promissory note for \$315 given by defendant to the plaintiff. The answer sets up the defense of want of consideration for the note, and the defendant, by way of counter-claim, declares upon the general count for goods, wares and merchandise sold and delivered by the defendant to the plaintiff of the value of \$700, which, defendant alleges, the plaintiff promised to pay, but has wholly failed so to do after demand, wherefore defendant prays judgment over against the plaintiff for the sum of \$700 with legal interest. The trial court made no special findings of fact but found in favor of the plaintiff generally as follows, quoting from the decision: "I am of the opinion that the plaintiff should recover of and from the defendant the sum of Three Hundred Fifteen and no/100 (\$315.00) Dollars, together with interest thereon at the rate of 8% from the 10th day of February, 1913, to the date of judgment herein, and I do so find from the evidence and I further find from the evidence that defendant has failed to make out his alleged defenses of want of consideration and set-off or counter-claim and the plaintiff has established her case as alleged in her complaint by a preponderance of the evidence."

The cause comes here upon exceptions, the first four of which are to rulings of the court in refusing, on cross-examination of the plaintiff, to permit the defendant to go into the merits of his defense and counter-claim. The court was acting within its proper discretion in this regard. While the trial court may permit the defendant, on cross-examination of a witness, to go into the merits of his defense by inquiring into matters not testified to by the witness on direct examination, it is better practice not to permit him to do so. The first four exceptions are overruled.

The fifth exception is to the action of the trial court in refusing to admit in evidence a certificate of the marriage between plaintiff and defendant which antedated the

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transactions involved. This was error. The defense was want of consideration based on the proposition that there was no consideration for the note as it grew out of a contract between the parties during coverture. The marriage certificate was competent evidence but as both parties testified to the marriage relation and the record of a divorce granted the defendant from the plaintiff in 1912 was admitted in evidence this error was not prejudicial.

The remaining exception necessary to be considered is to the decision of the court finding in favor of the plaintiff and to the decision finding against the defendant upon his counter-claim. The facts which the evidence tends to prove may be summarized as follows: Plaintiff and defendant were husband and wife and lived together as such for many years. In August, 1911, the plaintiff returned from Japan where she had been visiting, and, according to her testimony, upon her return she paid or turned over to the defendant, her husband, with whom she was living, \$315 which she had borrowed from her brother in Japan. The defendant, while testifying as a witness, denied receiving this or any money from the plaintiff, but testified that the plaintiff brought with her considerable dress goods which she sold, retaining all the money from such sales, none of which came into his hands. The defendant (the husband) sued plaintiff for a divorce, and in May, 1912, a decree of divorce was granted in the circuit court of the first judicial circuit, Territory of Hawaii, the same to become effective June 1, 1912. There was born to plaintiff and defendant a daughter who, at the time of the decree, was about five years of age. The decree is silent as to the care and custody of this infant child. By an arrangement, after the parties were divorced, the mother retained the care and custody of the child and defendant claims to have turned over to her a store of the value of \$700 with the agreement that plaintiff would support their infant daughter out of the proceeds of the store,

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but if she ceased to do so or remarried the store was to revert back to him. After the last transaction mentioned the plaintiff was married to another person, whereupon defendant demanded the return of the store, or in lieu thereof payment of the sum of \$700, which was refused. Soon after this the plaintiff commenced the present action.

It is argued on behalf of the defendant that the transaction between the parties during coverture, as regards the \$315, constituted a loan and was therefore a contract, either express or implied, between husband and wife, and as such prohibited by law and void, and the same is not a consideration which will support the note sued on in this action.

By the statutes of the Territory of Hawaii a married woman may contract with all persons as if feme sole except she cannot contract with her husband.

It is urged on behalf of the plaintiff that the money which she furnished the defendant was of her separate estate and therefore the defendant was liable to her for the same in equity, and that this equitable obligation is a sufficient consideration for the note sued on. We will not discuss these conflicting theories for the following reasons: A very careful consideration of the record in this case shows that the evidence is not sufficient to show a loan by the plaintiff to the defendant in 1911. The plaintiff testified that she returned from Japan in August, 1911, and "paid" or "turned over" to the defendant, her husband, \$315 which she had borrowed in Japan. The defendant denies positively that the plaintiff delivered to him this money or any other money, hence, under the evidence, if the plaintiff's evidence be accepted as correct, the money may have been delivered to the defendant either as a gift or as a loan. If as a loan the question of its validity would arise, and if the contract was void as between the parties then it would be necessary to pass upon the question as to whether or not the plaintiff's theory of an equitable obligation is correct. But if the

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transaction did not occur at all, as claimed by defendant, or if it did occur and the money was given by the plaintiff to the defendant as a gratuity then the question as to whether or not a past consideration under such circumstances would be sufficient consideration for the note given by the defendant to plaintiff after discovery would arise.

The exception to the decision is that it is against law, against the evidence and against the weight of the evidence. The decision does not state the grounds upon which it is based, as required by section 2380 R. L., and this is true also of the decision in so far as it relates to the defendant's counter-claim or set-off. The failure to state such reasons is reversible error (*Kahai v. Yee Yap*, 20 Haw. 192).

The sixth exception is sustained and the cause remanded to the circuit court with instructions to set aside the judgment and grant the defendant a new trial.

C. S. Davis for plaintiff.

J. B. Lightfoot (*Lightfoot & Lightfoot* on the brief) for defendant.

Syllabus.

IN THE MATTER OF THE APPLICATION OF
THOMAS G. SILVA AND Y. ENDO FOR A WRIT
OF HABEAS CORPUS.

No. 1018.

APPEAL FROM CIRCUIT JUDGE, THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

ARGUED MAY 31, 1917.

DECIDED JUNE 15, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

CRIMINAL LAW—*jurisdiction—costs—excessive sentence.*

A judgment of a district court sentencing a defendant to imprisonment for one year and to pay costs in a certain sum upon a charge of larceny in the second degree is in excess of jurisdiction as to such costs.

HABEAS CORPUS—*exceeding jurisdiction—separable judgments.*

In habeas corpus proceedings the return showed that petitioner was committed to serve one year imprisonment and to pay costs in the sum of \$2.50 upon a mittimus issued on a judgment of a district court on the charge of larceny in the second degree: Held, that the judgment as to costs is in excess of the jurisdiction of the court, but the same being separable from the judgment as to imprisonment must be treated as surplusage and the petitioner remanded to serve out the term of imprisonment and to then be discharged.

OPINION OF THE COURT BY QUARLES, J.

The petitioners Thomas G. Silva and Y. Endo were arrested and charged on the 13th day of November, 1916, in the district court of North Kona of the offence of larceny in the second degree, and then and there plead guilty to said charge. Thereupon the district court sentenced each of the petitioners to be imprisoned for a term of one year in jail and to pay the costs taxed against each in the sum of \$2.50, and under mittimus they were confined in the jail at Kailua.

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To procure their discharge from said imprisonment the petitioners, on December 12, 1916, petitioned to the circuit court of the third judicial circuit for a writ of habeas corpus, which writ was duly issued. The sheriff made return to said writ and as a part thereof the mittimus under which petitioners were confined is attached thereto. After hearing the writ was discharged and the petitioners were remanded to the custody of the respondent sheriff. From the judgment discharging the writ and remanding the petitioners they have appealed to this court.

The principal question before us is whether or not the sentence imposed upon the defendants by the district court is void because in excess of the jurisdiction of the court, inasmuch as to the maximum sentence which may be imposed the court added the sum of \$2.50 costs against each of the petitioners. This question is to be determined by the application and interpretation of certain sections of the Revised Laws which are as follows:

“Sec. 2299. Criminal, generally. District magistrates shall have jurisdiction of, and their criminal jurisdiction is hereby limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without hard labor or with or without fine. Provided, however, that they shall not have jurisdiction over any offense for which the accused cannot be held to answer unless on a presentment or indictment of a grand jury; and, provided, further, that in any case cognizable by a district magistrate as aforesaid in which the accused shall have the right to a trial by jury in the first instance, the district magistrate, upon demand by the accused for such trial by jury, shall not exercise jurisdiction over such case, but shall examine and discharge or commit for trial the accused as provided by law, but if in any such case the accused shall not demand a trial by jury in the first instance, the district magistrate may exercise jurisdiction over the same subject to the right of appeal as provided by law.”

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"Sec. 3932. Degrees; punishment. Larceny is of two degrees, first and second. Larceny of the property of the value of more than fifty dollars is in the first degree, and shall be punished by imprisonment at hard labor not more than ten years.

"All other larceny is in the second degree and shall be punished by imprisonment at hard labor not more than one year, or by fine not exceeding one thousand dollars."

"Sec. 3779. Fees not payable by defendant. It shall not be lawful to take, demand, or receive any court fees for the issuing of any process for or on behalf of any person charged with, or indicted for, any felony or as accessory thereto, or with or for any misdemeanor in any court of criminal jurisdiction; nor shall it be lawful to take, demand or receive any fees from any such person for taking any recognizance of bail, or issuing any writ of habeas corpus, or recording any appearance, or plea to any information, or for discharging any recognizance taken from any such person, or surety or sureties for them, but all costs may be ordered to be paid by the person charged and convicted as part of the judgment."

"Sec. 3853. Execution for costs. Whenever in any criminal case a judgment of fine and costs or either of them, whether with or without imprisonment or other penalty, is imposed, execution may be issued thereon after ten days from the time of judgment as on a judgment in a civil action."

"Sec. 3854. Imprisonment for fine; poor convict. When any such judgment of fine and costs or either of them, is not satisfied by immediate payment thereof, the offender so sentenced shall be committed to prison, there to remain, at hard labor or otherwise in the discretion of the court or magistrate, until such judgment is satisfied; provided, however, that hard labor shall not be imposed in cases of misdemeanor; and provided, further, that when any poor convict shall have been so imprisoned for one year, he may be discharged from custody by order of any circuit judge upon proof that he has not since his conviction had any estate out of which he could have satisfied such judgment, and that he is not held for any other cause; and provided further that such imprisonment, together with any other imprisonment that may have been imposed by the same sentence, shall not

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in any case of misdemeanor extend beyond the term of one year."

"Sec. 3855. Working out by imprisonment. When any person shall be so sentenced to pay a fine and costs or either of them and shall be imprisoned for non-payment of the same, the time of such imprisonment shall be deemed to discharge the same at the rate of one dollar a day."

By the first section quoted the jurisdiction of district magistrates in criminal cases is limited to offenses punishable by fine or by imprisonment not exceeding one year without hard labor (see *Territory v. Overbay*, ante 91) or with or without fine. By the provisions of section 3932 the maximum punishment for larceny in the second degree is, either by fine not exceeding one thousand dollars or by imprisonment not more than one year. By the wording of the statute the punishment must be either a fine or imprisonment but cannot be both. By the provisions of section 3779 court fees or costs are not taxable against the defendant in a criminal case, but the costs may be ordered to be paid by the person charged and convicted as a part of the judgment. This section clearly indicates a policy of not charging the cost of a criminal prosecution to the accused in case of his conviction unless it be done as a part of the punishment. The court, having sentenced the defendants to the maximum term of imprisonment, was without authority to impose any pecuniary punishment, and therefore that part of the judgment imposing costs upon the petitioners is in excess of the jurisdiction of the district court. This view is strengthened by the wording of section 3854, especially the last proviso therein, prohibiting in a case of misdemeanor the imprisonment of the defendant upon conviction for fine and costs beyond a term of one year. We therefore hold that that part of the judgment against the defendants subjecting them to the payment of costs, for which they may be imprisoned, if they be not paid, at the rate of one dollar a day, was erro-

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neous and void, but the same may be treated as surplusage as it is separable from the judgment sentencing the petitioners to imprisonment for one year. This conclusion is sustained by the ruling in the case of *United States v. Pridgeon*, 153 U. S. 48, 62, and other authorities. But the circuit court in discharging the writ and remanding the petitioners to the custody of the sheriff should have remanded them to serve out the remainder of the term of imprisonment and then be discharged.

The judgment discharging the writ of habeas corpus is affirmed and petitioners are remanded to the custody of the respondent sheriff to serve out the remainder of the term of imprisonment to which they have been sentenced and with directions to discharge the petitioners when they have fully served the term of imprisonment adjudged against them.

J. S. Ferry for petitioners.

W. H. Beers, County Attorney of Hawaii, for the Territory.

Syllabus.

TERRITORY v. JOE JIMENDE CAPITAN.

No. 1020.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED JUNE 2, 1917.

DECIDED JUNE 15, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

SEDUCTION—*chastity—pleading and proof.*

In a prosecution for the offense of seduction under R. L. 1915, Sec. 3902, the chastity of the female need not be alleged, nor need it be proved before it has been attacked, if at all. The unchaste character of the prosecutrix may be shown in defense. Where the burden of proof lies when the question of chastity has been made an issue, *quaere*.

SAME—*corroboration.*

The provision of R. L. 1915, Sec. 3903, that no person shall be convicted of seduction upon the uncorroborated testimony of the prosecutrix, requires supporting evidence as to the promise of marriage and the carnal connection, but not as to the previous chastity of the prosecutrix, or that she was unmarried.

SAME—*same—evidence.*

Whether, in a given case, there was any corroboration of the testimony of the prosecutrix is a question of law, but where there was some such evidence its sufficiency would be for the jury to determine. Held, in this case, that there was some circumstantial corroborating evidence, and that its weight and sufficiency was for the jury.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant was tried and convicted under an indictment charging him with the offense of seduction. Exceptions to the denial of a motion for a directed verdict of acquittal, to the verdict, and to the denial of a motion for a

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new trial have raised a number of questions which are involved in the general question whether there was sufficient evidence in the case to support the conviction. It is contended that there was a failure of substantive proof and a lack of the corroboration required by the statute.

Section 3902 of the Revised Laws provides that "Whoever by conspiracy or by wilful falsehood or deceit, or under promise of marriage, seduces, causes or procures any unmarried female to commit fornication shall be punished," etc. There was competent evidence tending to prove that the prosecutrix and the defendant were unmarried persons; that they were engaged to be married; that at Olaa, county of Hawaii, on the 14th day of November, 1915, the defendant urged upon the prosecutrix that as they were engaged he would like to have sexual intercourse with her, saying that if she did not consent it would show that she did not love him; that she at first objected but upon his earnest promise that he would marry her she yielded to his persuasion; and that the prosecutrix had not previously committed sexual intercourse.

As to proof of chastity. The statutes in some of the States include in the definition of the offense of seduction the element of chastity on the part of the prosecutrix, but the statute of this Territory does not include it. But as the nature of the offense is such that it cannot be committed upon a prostitute or strumpet, the unchaste character of the prosecutrix may always be shown in defense. See *Woodward v. Rep.*, 10 Haw. 416; *Caldwell v. State*, 83 S. W. (Ark.) 928; *Wilson v. State*, 73 Ala. 527, 535. The chastity of the prosecutrix need not be alleged, nor need it be proved before it has been attacked, if at all. There is a conflict of authority as to where the burden of proof lies when the question of chastity has been made an issue, but that point is not involved here. In the case at bar the testimony of the prosecutrix that she had had sexual intercourse with no one

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other than the defendant was not contradicted.

As to corroboration. Section 3903 of the Revised Laws provides that "no person shall be convicted of rape, seduction or abduction, upon the mere testimony of such female uncorroborated by other evidence direct or circumstantial." We do not sustain the contention of counsel that corroboration must extend to every point in the case. That there need be no corroboration of the chastity of the prosecutrix follows from what has already been said. And we hold that it does not extend to the fact of the prosecutrix being an unmarried female.

"The weight of authority tends to establish as the rule that it is not necessary that the corroboration should extend to all the elements of the offense. It must extend to the facts that the defendant had sexual intercourse with the prosecutrix and obtained her consent thereto by the use of seductive arts or by a promise of marriage, but it is not necessary that she should be corroborated as to her previous chastity or as to the fact that she was unmarried at the time of the alleged seduction." 25 A. & E. Enc. Law (2d ed.) 244, 245.

Under statutes similar to ours it is held that the supporting evidence need go only to the promise of marriage and the carnal connection. *Armstrong v. People*, 70 N. Y. 38; *Carrens v. State*, 91 S. W. (Ark.) 30; *People v. Clark*, 33 Mich, 112; *Ferguson v. State*, 15 So. (Miss.) 66; *Russell v. State*, 77 Neb. 519, 527. In the case at bar the fact that the parties were engaged to be married was admitted by the defendant through his counsel at the trial. The fact that the parties were engaged to be married is evidence that the seduction, if accomplished, was under the promise of marriage. The question then is whether there was corroboration of the testimony of the complaining witness that sexual intercourse was committed. The prosecutrix testified that she was seventeen years old; that the defendant came to her home on a Sunday afternoon; that her parents were away at the time; that her younger sister was at home but

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upon the defendant's arrival she went out; that she and the defendant sat first on the verandah, then went into the parlor; that upon consenting to yield to the defendant's importunity she closed and locked the kitchen and parlor doors; that after the act had been committed she and the defendant went out again to the front verandah, and afterwards went together to a neighbor's place where a dance was going on; that the defendant had frequently visited her for a month or so during which time they had been engaged; and that in December the defendant went to the island of Kauai. The complainant's sister testified that she was at home when the defendant came to the house; that she went out to play with another girl; that she left the prosecutrix and the defendant alone in the house; and that later, on returning to the house, she found the back door locked, and going around to the front found the two sitting on the verandah. An aunt of the prosecutrix who lived in the same neighborhood testified that the defendant came to her house on the day in question, and in reply to a question as to where he was going he said he was going to his girl's house; that she told him not to go there because the parents were away and the girl was alone; that he then said he would not go there; that about half an hour later she saw the defendant walking in the direction of the prosecutrix' home; and that she afterwards went over there and saw him and the prosecutrix on the verandah of the house. The only other witness to testify in the case was one Frank Murera. He testified that while passing by on the day in question he saw the prosecutrix and the defendant in the front room of the house; that the door was open; and that he saw the prosecutrix' sister and another girl out on the road. The prosecutrix had testified that Frank Murera passed the house before the sexual act took place. The corroboration required by the statute need not be of such force as would prove the facts independently of the female's testimony. 35 Cyc. 1364.

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Whether, in a given case, there was any corroboration of the testimony of the prosecutrix is a question of law, but where there was some such evidence its sufficiency would be for the jury to determine. *Hay v. State*, 178 Ind. 478; *State v. Waterman*, 75 Kan. 253, 257; *State v. Lockerby*, 50 Minn. 363; *State v. Smith*, 84 Ia. 522, 525. Proof of mere opportunity does not of itself amount to corroboration, but as sexual intercourse is seldom susceptible of direct proof it may be inferred from circumstances, opportunities and the conduct of the parties, and in cases of this character the corroboration will generally be found to depend upon circumstantial evidence. Each case must depend upon its own circumstances, and the views expressed by the courts in the decided cases are helpful only in a general way. In *Armstrong v. People, supra*, the court said,

“It is conceded by the authorities that direct evidence in support is not capable of production, and that the requirement of supporting evidence is met, when from testimony of other witnesses such opportunities are shown to have existed, and such relations to have been formed, as to make it probable that the act may have been done. * * * When these circumstances and relations have been shown, the supporting evidence has been furnished. How great its strength, or how close its applicability to the act as spoken to by the principal witness, is for the jury to determine.” 70 N. Y. 45.

In *Mills v. Com.*, 93 Va. 815, 818, it was said,

“No case has occurred, it is believed, in which it has been necessary accurately to weigh and discriminate the character, quantity or degree of supporting testimony necessary to justify a conviction; nor is it the purpose of this opinion to undertake to indicate the precise amount of corroborating testimony which would in all cases be found sufficient. It is sufficient here to say that it must be evidence which does not emanate from the mouth of the seduced female; that it must not rest wholly upon her credibility, but must be such

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evidence as adds to, strengthens, confirms and corroborates her."

In *Curry v. State*, 151 S. W. (Tex.) 319, the court said,

"However, we do say that the law is that the testimony of the injured party in cases of this character does not have to be corroborated in each and all of the necessary elements of the offense, and that the corroborative evidence may be slight, and that the requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the accused with the commission of the offence. Such corroboration only is necessary as is sufficient to satisfy a jury, beyond a reasonable doubt, of the truth of the charge, in connection with the testimony of the accomplice."

In *Ferguson v. State*, 15 So. (Miss.) 66, 70, the court said,

"The object of the law is to prevent the conviction of one accused on the unsupported testimony of one participating in the commission of the offense. As with the accomplice, so here, corroboration to the extent of fairly tending to connect the accused with the commission of the offense should be held sufficient. The female seduced appears on the witness stand as quasi particeps criminis, and under a cloud. Whatever other evidence will fairly satisfy the jury that she is truthful and worthy of belief must be held sufficiently corroborative; and when she is supported as to the promise of marriage and the act of sexual intercourse,—the two great fundamental essentials,—the corroboration, we think, will be sufficient."

In the case at bar we think it cannot be said that the testimony, other than that of the prosecutrix, shows nothing more than an opportunity to commit sexual intercourse with the girl. It showed that the defendant had been told that her parents were away from home; that he had been asked by the aunt not to go to the house for that reason; that he said he would not go there, but nevertheless he did go; that the two were alone in the house for some time; and that the back door had been locked. There was nothing in the evidence to indicate that a scheme had been concocted

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to blackmail the defendant. We hold that there was circumstantial evidence of corroboration, and that its weight and sufficiency as tending to establish the truth of the testimony of the prosecutrix was for the jury. See generally, *State v. Holter*, 30 S. D. 353, 369; *Murphy v. State*, 143 S. W. (Tex.) 616, 619; *State v. Timmens*, 4 Minn. 241, 248; *State v. Whitaker*, 87 S. E. (S. C.) 1001. There were no exceptions to the instructions and we presume the case was fairly submitted to the jury.

The exceptions are overruled.

W. H. Beers, County Attorney of Hawaii (*S. S. Rolph*, Deputy County Attorney of Hawaii, with him on the brief), for the Territory.

J. S. Ferry (*J. W. Russell* with him on the brief) for defendant.

CAROLINE J. ROBINSON v. LORRIN A. THURSTON
AND JOHN D. PARIS, EXECUTORS UNDER THE
WILL OF ELIZA ROY, DECEASED.

No. 993.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED APRIL 30, 1917.

DECIDED JUNE 15, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

CONTRACT—*release on conditions subsequent.*

The release of an existing debt upon conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs. The release will be avoided if the conditions are not complied with.

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SAME—illegal contract not to be enforced by court.

A party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. Courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare.

SAME—void as against public policy.

The state has a general interest in the freedom of its people in the exercise of their legal and normal rights and any contract that is subversive of those rights without any benefit to the restrainer is against public policy.

SAME—same.

A contract which attempts to restrain another from incurring indebtedness in the sum of one thousand dollars and upwards without limit as to time or place, without benefit to the covenantee, is an unreasonable restraint of trade and void because against public policy.

PLEADING—rule of court.

A rule of court requiring a defendant to give notice that the defense of illegality will be relied upon does not apply where the illegality appears upon the face of the plaintiff's complaint.

OPINION OF THE COURT BY COKE, J.

(Robertson, C.J., dissenting.)

The defendants are the executors of the will of Eliza Roy, deceased, who died on or about August 29, 1912. The plaintiff is a daughter of Eliza Roy. On November 27, 1905, and for a long time prior thereto, Eliza Roy was indebted on three separate promissory notes which were at that date owned and held by plaintiff. The total amount of indebtedness on these several obligations amounted, in principal and interest, to \$14,490.83, the greater part of which was accumulated interest. On that date the plaintiff and Eliza Roy entered into an agreement respecting said indebtedness, in which agreement Eliza Roy acknowledged the indebtedness

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of \$14,490.83 as due from her to the plaintiff Caroline J. Robinson, and the said Caroline J. Robinson, in consideration of the sum of ten dollars and in further consideration of the covenants and agreements of Eliza Roy set forth in the agreement, acknowledged full payment and settlement of the indebtedness upon the proviso that if Eliza Roy should at any time thereafter mortgage or sell any of her real estate or incur indebtedness amounting at any one time to the sum of one thousand dollars and upwards, without the consent in writing of Caroline J. Robinson, then and in such case the acknowledgment of payment of said indebtedness, and the release and cancelation and discharge of said notes would be null and void and of no effect, and the said indebtedness would thereby become immediately due and payable. As this case turns entirely upon the agreement made between Eliza Roy and plaintiff the same is set forth in full as follows, to wit:

"This agreement made this twenty-seventh day of November by and between Caroline J. Robinson of Honolulu, Territory of Hawaii, and Mrs. Eliza Roy, widow of W. F. Roy of Kona, Island of Hawaii, Witnesseth:

"Whereas the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums:—" (Here the notes are separately listed and described).

"Total amount of principal and interest as of November 23, 1905 \$14,490.83.

"And Whereas the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claims under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions;

"Now therefore in consideration of the premises and of the sum of Ten Dollars (\$10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged and

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in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Robinson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

"Provided however that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards without the consent in writing of the said Caroline J. Robinson, then and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made.

"The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, executors, administrators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess, at any one time, of the sum of One Thousand Dollars (\$1,000).

"And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtedness and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Robinson, her heirs, executors, administrators and assigns, in the same

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manner as though this acknowledgment of payment and release had not been made.

"In Witness Whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

	"Caroline J. Robinson	
		her
"Witness	"Eliza Roy	X
"L. A. Thurston		mark"

It is conceded that this agreement was executed November 27, 1905.

After the death of Eliza Roy the plaintiff duly presented to the defendants, as executors aforesaid, her claim under and in respect of said promissory notes, demanding payment thereof. This claim having been rejected by defendants plaintiff commenced her action in the circuit court for recovery of said claim, alleging in her complaint, in substance, that said notes had become due to plaintiff by reason of the fact that after the execution of the agreement of November 27, 1905, and prior to her death, "said Eliza Roy did sell and convey certain portions of her real estate without the consent of the said plaintiff, and did, without the consent of plaintiff, incur indebtedness amounting in the aggregate at one time to more than one thousand dollars."

The defendants answered denying generally all of the allegations of the complaint and gave notice that among other defenses they intended to rely upon the defense of payment, statute of frauds and the statute of limitations. Shortly thereafter defendants filed an amended answer admitting some of the allegations of the complaint and generally denying the allegations not so admitted, and further setting up as a defense that all of plaintiff's claims against Eliza Roy were fully paid and settled by the agreement dated November 27, 1905, and that all of said claims were barred by the statute of limitations. Upon the issues thus formed the

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cause went to trial before the circuit court of the first circuit without a jury, the right to a trial by jury having been waived by both parties. At the conclusion of the case the trial court rendered a decision in which it found as a fact that Eliza Roy, prior to her death and after the execution of said agreement of November 27, 1905, did incur indebtedness at one time to an aggregate amount of more than one thousand dollars.

The trial court held, however, that under the provisions of said agreement the claims of plaintiff were totally released and discharged; that the clause in said agreement which acknowledged full payment and satisfaction of the indebtedness and released, canceled and discharged the notes, constituted a complete liquidation thereof; that the same became utterly and absolutely extinguished and could have no further existence as a legal obligation. The trial court adopted the law as expressed in the case of *Tyson v. Dorr*, 6 Whart. (Pa.) 255, and gave judgment in favor of defendants and plaintiff comes here on a writ of error.

The plaintiff abandoned her claim that Eliza Roy violated the provisions of the agreement against the alienation of her property without the written consent of the plaintiff and now relies solely upon the alleged violation of that part of the agreement which prohibited Mrs. Roy from incurring indebtedness at any one time in the sum of one thousand dollars or upwards without the written consent of plaintiff. Thus the issues are narrowed down to a consideration of this single clause in the agreement. The trial court having found that Mrs. Roy, subsequent to the date of the agreement and prior to her death, did incur indebtedness at one time in the sum of one thousand dollars and upwards, we are unwilling to disturb this conclusion, although the evidence was, to say the least, not overly strong. It appears from the evidence that after Mrs. Roy's death various debts which she is alleged to have incurred while living were

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brought to light, amounting in all to the sum of \$1386.45. The greater portion of this indebtedness was made up of a telephone bill which amounted to \$768. This bill had been paid by her son-in-law in instalments from time to time and had been running for more than ten years. The son-in-law testified that he never intended to present the bill and that the same was first mentioned while Mrs. Roy was on her deathbed, at which time, it is claimed, she acknowledged the bill and directed that it be paid by her representative. The weakness of the evidence respecting this alleged indebtedness was, perhaps, in a large measure cured by admissions of counsel for defendants made during the trial.

The record now before us discloses that the first note herein referred to was dated in 1884, the second in 1886 and the third in 1895. The last payment made on any of said notes was in the year 1889. The principal of said notes amounts to the sum of \$5875 and the interest now claimed amounts to \$12,707. From these facts the statute of limitations would appear to have run against the several obligations long prior to the execution of the agreement between Mrs. Roy and the plaintiff in 1905. There may have been promises to pay or other acts on the part of Mrs. Roy which would have revived the obligations prior to the making of said agreement. Upon this subject the record is entirely silent.

We disagree with the decision of the trial court holding that the effect of the agreement was a complete release and discharge of the indebtedness and that "a man cannot release a personal action as an obligation with a condition subsequent, but the condition will be void, for a personal action once suspended is extinguished forever." The ancient case of *Tyson v. Dorr*, supra, cited in support of this doctrine, has long since been discarded and the modern rule is that a release of an existing debt with conditions subsequent

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merely suspends the right of action thereon until such time, if ever, the event contemplated occurs.

"A release may also be subject to a condition subsequent; and in that case the release will be avoided if the condition is not complied with." 2 Addison on Contracts, Pt. 2, p. 836.

"It is not and never was, true that in no mode and under no circumstances can a personal action be suspended." *Belshaw v. Bush*, 11 C. B. 201.

"There are also cases in the books where a contract having been broken, and a cause of action having accrued thereon, a new contract between the debtor and creditor and additional parties, creating new rights and liabilities, has been made and accepted as a conditional accord and satisfaction and discharge of the cause of action, so that if the new contract is carried out by the new parties in all its integrity, the original cause of action is extinguished and gone forever; and if it is not fully carried out the party is remitted to his original right of action upon the original contract." 2 Addison on Contracts, Pt. 2, p. 838. See also *Newington v. Levy*, 6 L. R. C. P. 180.

"We * * * think it would be most unjust for a debtor to be allowed to take advantage of a release only granted on a condition he has not performed." *Hall v. Levy*, 10 L. R. C. P. 154.

There is another phase of this case which, while almost wholly ignored in the court below and in the briefs and argument of counsel before this court, demands consideration, and that is the question of the validity of the clause in the agreement between Eliza Roy and plaintiff herein restraining Eliza Roy from incurring indebtedness at any one time to the amount of one thousand dollars or upwards without the written consent of plaintiff. Under other circumstances we might feel constrained to ignore all questions not properly urged for our consideration by counsel. But in this case the agreement is before us and plaintiff can only prevail upon its strength and validity. If we find that the condition in the agreement, for the violation of which plaintiff must depend solely for judgment in this case, is

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for any reason void, we conceive it to be our duty to so declare.

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim." 9 Cyc. 546. See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264.

"Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare." 6 R. C. L. 712.

"Whether a contract is against public policy is a question of law for the court." 9 Cyc. 483.

The clause in the agreement hereinabove set out attempted to restrain Eliza Roy from incurring indebtedness at any one time in the sum of one thousand dollars or upwards without plaintiff's written consent. This restraint is without bounds or limit either as to place or duration. At no time during her life and at no place and under no circumstances could Eliza Roy incur the indebtedness unless with the consent of plaintiff without committing a breach of the condition in the agreement. Occasions might arise where it would be of great advantage to Mrs. Roy and to her estate for her to exercise the right to incur indebtedness in the amount mentioned. An emergency might occur during her lifetime, caused by sickness or otherwise, whereby her self-preservation would demand the exercise of this right. And on the other hand, wherein lay the benefit to plaintiff by reason of this extraordinary and unusual restraint upon the legal rights of Mrs. Roy, to wit, the right to trade upon her credit? It might be said that plaintiff, being a daughter of Mrs. Roy, would, in the event she died intestate, become one of the heirs of her estate and that for this reason she had an interest in the conservation of her

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mother's property. We deem this consideration altogether too remote. Mrs. Roy might have made a will prior to her death devising her property to her other children or even to strangers, in which event the plaintiff would have no interest in the property of which her mother died possessed. See *Kalaniana'ole v. Liliuokalani*, ante 457, 472. Then how could plaintiff suffer by the breach of the contract? As a matter of fact Mrs. Roy might, by the exercise of her right to incur indebtedness, have greatly enhanced the value of her estate.

Ch. J. Parker, in *Mitchel v. Reynolds*, 1 P. Wms. 181, said: "A particular restraint is not good without a just reason and consideration."

"The * * * question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party *in favour of whom it is given*, and not so large as to interfere with the interests of the public. *Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either*, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." *Horner v. Graves*, 131 Eng. Rep. 287; 6 R. C. L. p. 789.

The growth of commerce and the usages of trade demand the free exercise of the right to extend credit and to have credit extended; to enjoy the right to borrow as well as the right to lend; and unless there appears some clear and positive benefit to accrue to the covenantee by reason of the subversion of these rights a contract to that effect will be held an unreasonable restraint of trade and void because against public policy.

"Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made is unreasonable and void, as injurious

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to the interests of the public on the ground of public policy." *Mallan v. May*, 11 Mee. & W. 653. See also 63 Am. Dec. 384.

The state has a general interest in the freedom of its people in the exercise of their legal and natural rights and any contract that tends to curtail those rights without any benefit to the restrainer is against public policy. The right to borrow has been recognized for ages. The commerce of the world is conducted largely on credit, and while the disposition to incur indebtedness may in some instances prove harmful, yet the right to borrow is universally recognized as a valuable privilege often indulged, and not infrequently to the great benefit and advantage of the borrower. It is not an over-statement to say that countless firms and individuals, and even nations, are constantly being saved from financial wreck and disaster by timely recourse to this privilege.

"If an agreement binds the parties or either of them, or if the consideration is, to do something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. If a court should enforce such agreements it would employ its functions in undoing what it was created to do." 9 Cyc. 481.

"Any stipulation, agreement or contract which forbids the debtor from discharging his obligation by borrowing the money, in whole or in part, except from the creditor, is subversive of the rights of the citizen, injurious to the general welfare of the public and is therefore void on the high ground of public policy." *Union Cent. Life Ins. Co. v. Champlin*, 65 Pac. 836.

While the facts of the case just cited are entirely dissimilar to those of the case at bar, yet the principles of law therein enunciated have application here.

We are of the opinion that the clause in the agreement referred to, which attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of one

Quarles, J., concurring.

thousand dollars or over without the consent of plaintiff herein, constituted an abnegation of her legal rights, without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy. It follows that, the condition being void, an action based upon a breach thereof could not be maintained. The reasons advanced by the trial court for its decision in favor of the defendants were erroneous, but the conclusions are correct and will therefore not be disturbed. *Notley v. Notley*, ante p. 724.

The judgment of the circuit court is affirmed.

C. H. Olson and *M. B. Henshaw* (*Holmes & Olson* with them on the brief) for plaintiff in error.

Andrews & Pittman for defendants in error.

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion and reasoning of the opinion written by Mr. Justice Coke. The theory of the plaintiff as set forth in her complaint is that the notes sued on and the mortgages securing them were released by the agreement of November 27, 1905, such release subject to defeasance upon the happening of either of two conditions subsequent, viz., the alienation of any of her real estate or the incurring of indebtedness to the extent of one thousand dollars at any one time by Mrs. Roy without the written consent of the plaintiff. The plaintiff relies upon the happening of the last condition subsequent as defeating the release and reviving her cause of action upon the notes sued on here. The agreement is pleaded by plaintiff in effect and copies attached to and made a part of plaintiff's complaint, and the questions upon which the decision here rests are raised in and appear upon the face of the complaint. If the agreement as to the conditions subsequent is not valid and binding, but, on the other hand, is void for the reason

Robertson, C.J., dissenting.

that such conditions subsequent are contrary to public policy the complaint shows no cause of action and it is not necessary to plead their illegality or to give notice thereof. The rule of the circuit court requiring notice that the defense of illegality will be relied on was not intended to apply to such defense when it appears upon the face of the complaint. The plaintiff must plead a valid and legal contract. The conditions of defeasance being contrary to public policy and void, and so shown upon the face of the complaint, no question of evidence is involved, the only question being, is the plaintiff entitled to judgment upon her own showing? The trial court held that she was not on the ground that the notes sued on were released by said agreement. The conclusion of the trial court was correct. To hold otherwise would be equivalent to holding that plaintiff is entitled to judgment by reason of a contract against public policy, thereby giving the consent of the court to the enforcement of such contract. In my opinion the court cannot do so and the judgment appealed from should be affirmed.

DISSENTING OPINION OF ROBERTSON, C.J.

I concur in the ruling made that the circuit court erred in holding that the plaintiff could not recover because, as supposed, a release of a personal obligation upon condition subsequent must as matter of law operate as an absolute release. But I must dissent from the further ruling that the judgment should be affirmed on the ground that the condition subsequent was against public policy and void, and that the release, therefore, was an absolute one. Rule 4 of the rules of the circuit court of the first circuit provides that "no defendant shall be allowed to set up" certain defenses, including the defense of illegality, "unless he shall,

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on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same." The point that the contract is illegal was not raised in the trial court by demurrer, answer or otherwise, nor have the appellees urged it in this court. But it is said that the condition of the release is in and of itself contrary to public policy, and that it is the duty of this court upon its own motion to decline to enforce it. The principal opinion seems to concede, however, that if the provision as to incurring indebtedness in excess of \$1000 was a "benefit" to the plaintiff, or if she might "suffer by the breach" of the contract, or if it was a "reasonable restraint," or if the restraint was not "larger than what was required for the necessary protection" of the obligee, it would not render the condition invalid. Yet, by affirming the judgment of the circuit court, this court precludes the plaintiff from the opportunity of showing, if she could, that the restraint was reasonable, or that the condition was a benefit to her and that she would suffer by its breach. She is practically denied her day in court on that matter. The case of *Notley v. Notley*, cited in the principal opinion, was an equity appeal, the entire case was before this court upon the facts as well as the law, and the conclusion of this court was based upon evidence contained in the record. This case seems to be decided upon a lack of evidence upon a point which was not agitated in the trial court.

I think the agreement in question is not illegal upon its face because of the condition referred to. Public policy is more concerned with the enforcement of private contracts than it is with defeating them. The supreme court of the United States in *B. & O. R. Co. v. Voigt*, 176 U. S. 498, 505, said, "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce

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contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare." In *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 462, 465, Sir George Jessel, M. R., said, "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice." In 9 Cyc. 542, it is said, "And one may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights." And see, *Brooks v. Cooper*, 50 N. J. E. 761, 767; *Collister v. Hayman*, 183 N. Y. 250, 256; *Mosler Safe Co. v. Safe Dep. Co.*, 199 N. Y. 479, 485; *Waite v. Merrill*, 4 Greenl. 102. In *Daley v. People's B. L. & S. Assn.*, 178 Mass. 13, 19, it was said, "Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own."

Wherein an agreement made with her daughter by an elderly lady living upon her own means and upon her own premises in a country district, who does not appear to have been engaged in any business, trade or profession, upon a valuable and adequate consideration, that she will not incur indebtedness at any one time in excess of \$1000, is unreasonable, oppressive, immoral, or detrimental to public interests or welfare, I humbly confess my inability to see.

Syllabus.

TERRITORY *v.* LUM DIM, ALIAS LUM TIM.

No. 1014.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

ARGUED MAY 29, 1917.

DECIDED JUNE 23, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

JURY—*qualifications.*

The jury is a body of men foresworn to declare the facts of the case as they are proved from the evidence placed before them, and this means that the jury must declare the facts upon all the evidence and be willing to weigh all the evidence irrespective of its source.

SAME—*same.*

In a criminal prosecution where the accused through his attorney relies upon the defense of insanity a jury is not impartial when one of its members has expressed on his examination a determination to give no weight to the evidence of the insanity of the defendant at the time of the commission of the crime unless such evidence be that of a physician.

SAME—*refusal to sustain challenges for proper cause.*

A refusal to sustain challenges for proper cause necessitating peremptory challenges on the part of the accused will be considered as prejudicial where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury.

OPINION OF THE COURT BY COKE, J.

The defendant Lum Dim was indicted, tried and convicted before the circuit court of the third circuit charged with the crime of murder in the first degree which in this Territory carries the death penalty. The accused comes to

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this court on exceptions. The only exceptions which merit consideration by this court have to do with the rulings of the trial court during the examination of jurors Kenji Saki and G. W. A. Hapai on their voir dire. The following is a part of the examination of juror Kenji Saki, and contains the matters complained of by defendant: "Q. Do you believe, in a case of this kind, in the plea of insanity? A. I believe by word of an experienced doctor. Q. Only through an experienced doctor? A. Yes sir. Q. You would not believe any other witness, layman? A. No, I think not." Counsel for defendant thereupon challenged the juror for cause, which challenge was disallowed by the court and the defendant, by his counsel, excepted to the court's ruling. Thereafter, and before the jury was finally selected, Mr. Ferry, counsel for the defendant, addressed the court in the following language: "Before the court takes a recess I would like to call the court's attention to the matter of the examination of the juror Kenji Saki and the court's ruling on my challenge for cause on the juror's statement that he would believe only the evidence of a physician on the question of insanity. I desire to renew my challenge and ask that I be allowed to reopen the examination of Saki and go into that question and have the court rule upon it inasmuch as the court has already ruled in the case of other jurors and sustained my challenge upon the same ground." The court disallowed this request and defendant, by his counsel, excepted.

Upon his voir dire the following question was propounded to juror G. W. A. Hapai by defendant's counsel: "Q. If there be no testimony given by a doctor relative to the insanity or sanity of the defendant, but only given by laymen, will you give any weight to that testimony of the laymen in favor of the defendant? A. I don't think so." Whereupon the defendant's counsel challenged the juror

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for cause and the court held the juror competent. To this ruling counsel for defendant excepted.

The defendant is charged with having shot and killed one Kim Hing at Pahala, district of Kau, Territory and County of Hawaii, on or about the 15th day of October, 1916. So far as the record discloses the prosecution assigned no motive for the crime. The accused and the deceased were both Chinese and had partaken of a meal, together with other Chinese, at a restaurant at Pahala on a Sunday afternoon. The accused had retired to his room where he had spent some time smoking a pipe. He then went from his room upon the verandah of the building, took from his pocket a loaded revolver and shot the deceased twice in the back, and as the deceased lay dying on the ground the accused shot him several times more. The accused then walked away and was within a very short time apprehended by a police officer. The accused at that time, and later on as a witness in his own behalf, gave as a reason for his act his belief that the deceased had on various occasions put poison in his food, which had caused him to become sick and enfeebled; that he had frequently remonstrated with the deceased but deceased had failed to desist or to pay attention to him and for that reason the crime was committed. All of which, it is claimed by counsel for the defense, was a mere hallucination on the part of the accused.

Counsel for the accused indicated by his questions to the jury that he intended to set up the defense of insanity in behalf of defendant. This intention on the part of counsel was stated in open court before the jury was finally accepted. Counsel for the accused exhausted all of his twelve peremptory challenges, but jurors Kenji Saki and G. W. A. Hapai were retained on the jury over the objections and challenges for cause interposed by counsel for the defendant. The sole defense relied on by counsel for defendant

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was that of the alleged insanity of the accused at the time of the commission of the crime, and while there was no evidence of a physician introduced touching this question by either the prosecution or the defense the defense did produce several non-professional witnesses, who were neighbors and acquaintances of the accused, and who gave testimony of certain facts and circumstances which tended, at least to some extent, to show that the defendant was of unsound mind.

It undoubtedly follows that a juror in the frame of mind of juror Kenji Saki, as stated by him in his examination, would necessarily give no weight to the testimony of these witnesses. If all the other jurors who tried the case had been of the same opinion as juror Kenji Saki the accused, by his counsel, might have made out a most perfect defense, based upon a plea of the insanity, by testimony of non-professional witnesses, and yet the same would have been of no avail. The law allows an accused the defense of insanity and there is no law that requires that this insanity shall be established by the testimony of physicians or by the testimony of any other class of professional or non-professional witnesses, and a juror who is unwilling to give weight to testimony given upon this subject by those other than physicians, is not a competent juror. A jury has been defined as a body of men foresworn to declare the facts of the case as they are proved from the evidence placed before them, and this means that the jury must declare the facts upon all of the evidence and be willing to weigh all the evidence, irrespective of its source. The defendant in this case was tried under a constitutional guarantee that he would be tried by an impartial jury.

"It is a fundamental rule that a juror should be thoroughly impartial between the parties; and in criminal trials especially great care should be exercised to preserve

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to the accused his constitutional right to an impartial jury and a fair trial, it being the rule in such cases that the court should resolve all doubts as to the competency of the juror in favor of the defendant." 16 R. C. L. 261.

A jury is not impartial when one of its members has expressed on his examination a determination to give no weight to the evidence of the insanity of the defendant at the time of the commission of the crime unless such evidence be that of a physician. There can be no doubt that by the rulings of the court below at the trial of this case the accused was deprived of a constitutional right, to wit, the right to a trial by an impartial jury.

"A refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, will be considered on appeal as prejudicial, where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury." *State v. Stentz*, 63 L. R. A. 807.

The exceptions are sustained and the cause is remanded to the circuit court for a new trial.

W. H. Beers, County Attorney of Hawaii (*S. S. Rolph*, Deputy County Attorney of Hawaii, with him on the brief), for the Territory.

J. S. Ferry for defendant.

Syllabus.

THE TERRITORY OF HAWAII, FOR THE USE AND
BENEFIT OF THE COUNTY OF MAUI, v. HUGH
HOWELL AND THE UNITED STATES FIDEL-
ITY AND GUARANTY COMPANY.

No. 1021.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED JUNE 12, 1917.

DECIDED JULY 2, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

OFFICERS—official bonds—breach of condition to perform duty.

The failure of a public officer to perform a duty resting upon him by virtue of his office constitutes a breach of condition of a bond given for the faithful performance of the duties of his office.

SAME—same—obligee—action on bond.

Where an improper obligee has been named in an official bond an action on the bond may be maintained in the name of the obligee for the use and benefit of the proper party, and the damages will be measured by the interest of that party.

COUNTIES—ordinances—appointment of officers.

An ordinance of the county of Maui providing for the appointment of a county engineer and defining his duties held not to conflict with the provision of statute (R. L. 1915, Sec. 1509) that the executive officer of the board of supervisors "shall exercise and have general supervision and control over all county affairs, and shall manage the same subject to the advice and direction of said board," nor to have been nullified or repealed by the provision of Act 217 of the Session Laws of 1915, that the executive officer shall "have the power and right to take charge of all county road work and other public construction work of the county," it not appearing that such power had been exercised.

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OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action against the principal and surety upon an official bond brought by the Territory of Hawaii for the use and benefit of the county of Maui. It was alleged in the complaint that the defendant Howell had been appointed county engineer under the provisions of ordinance No. 28 of the county of Maui, and, on the 9th day of February, 1915, entered into a bond as required by the ordinance in the sum of \$5000, with the United States Fidelity and Guaranty Company as surety; that the defendant Howell, as such engineer, assumed and undertook to perform the duties provided for in said ordinance, and continued so to do until the 31st day of August, 1915; that on or about April 20, 1915, one of the main public highways in the district of Hana, and over which the said defendant, under the provisions of said ordinance, as county engineer had full charge and responsibility, became washed out by a heavy freshet which left an open, exposed and impassable ditch or trench across the highway; that on the next day the attention of the said defendant was directed to the condition of the highway, and he inspected the same, but he "negligently and carelessly, and without regard for the duties of his office, failed and neglected to repair said highway, or to give any orders or directions with reference to the repair thereof; and further, failed and neglected to erect any barrier, light or warning to passers-by and users of said highway, or to give any orders, instructions or directions with reference to the erection of such guards, lights or warnings to passers-by and users of said highway; and the said road was, by said Hugh Howell, county engineer for the county of Maui, Territory of Hawaii, negligently and carelessly left in such open, exposed and dangerous condition for a long time thereafter;" that on the 29th day of July 1915, one Charles Reinhardt, a resident of Hana, while passing over said highway so negligently

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left in such dangerous condition, fell into said ditch or trench and was seriously injured; that said Reinhardt brought suit against the county to obtain damages for his injury, and recovered judgment therein for the sum of \$1700 which, with interest amounting to \$58.65, was paid by the county. Judgment against the defendants was prayed for in the sum of \$1758.65. Ordinance No. 28 created an "Engineer's Department" and the office of "County Engineer." It provided that "All work of the county having to do with the designing, surveying, constructing, care, maintenance, improving and alteration of all public buildings, grounds, sewers, street lighting, water-works, public highways, roads, streets, lanes, sidewalks, squares, courts, trails and bridges, and all material, stock, supplies, machinery, tools and other property used in connection with said work, shall come within the scope of the 'Engineer's Department.' " Also that the county engineer "shall have complete charge of, and be responsible for, all work connected and having to do with the engineer's department * * * subject only to written orders received from the board of supervisors," and shall report monthly to the board. (Sec. 5) The engineer was given power to appoint and remove, with the approval of the board, a "District Overseer" in each of several districts, who shall give a bond to the county, and report monthly to the engineer. The Territory of Hawaii was named as obligee in the bond, but it is alleged that the county of Maui is the beneficiary and real party in interest. The condition of the bond was for the faithful performance by the principal of the duties of his office, etc., in the form given in section 139 of the Revised Laws.

The defendants interposed demurrers to the complaint which were sustained by the trial court upon the grounds that the negligence complained of was that of either the district overseer or of the board of supervisors, and was not

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negligence for which the county engineer could be held liable; and that damages caused by negligence of the nature specified in the complaint are not among those obligations for which the surety stood responsible under the bond. We think the grounds upon which the demurrers were sustained are not satisfactory. The duties of the district overseer, if one had been appointed for the district of Hana, were not specified in the ordinance except that he should report monthly to the engineer, and, we presume, beyond that he would merely carry out the instructions of the engineer. It is alleged in the complaint that no directions were given in connection with the washout of the road in question. Nor upon the allegations of the complaint, which are taken as admitted by the demurrers, can it be said that the fault was that of the board of supervisors. The case made by the complaint is, in substance, this: that by reason of Howell's appointment as county engineer under the ordinance the care and maintenance of the highway came under his charge so that it became his duty when the road was washed out to cause it to be repaired or to see that in some appropriate manner persons using the road would be warned of its dangerous condition and protected from injury pending its repair, and that he negligently failed in that duty with the result that the county was obliged to respond in damages to one who was injured by falling into the unguarded trench. The facts alleged show *prima facie* a failure on the part of Howell to faithfully perform the duties of his office within the meaning of the condition of the bond. The terms of the bond define and determine the extent of the responsibility of both the principal and surety. *Foster v. Malberg*, 119 Minn. 168, 171. If the failure of the defendant Howell to perform the duty assigned to him resulted in loss to the county by its being obliged to pay the judgment recovered by Reinhardt there was a breach of the condition of the

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bond and both principal and surety became liable to suit. In *County v. Purdy*, 22 Haw. 272, which was an action by the county of Hawaii upon the official bond of a supervisor, this court said (p. 282), "The ultimate facts shown by the complaint and agreed statement of facts are sufficient to establish the failure of the defendant Purdy to perform positive duties resting upon him by virtue of his office. It neither requires logic nor extended argument to show that where an officer is acting in his official capacity and fails to perform a duty resting upon him, that he is not faithfully performing his duty."

Other grounds have been urged in this court by the appellees in support of the judgment, as follows: (1) that the Territory of Hawaii being the obligee named in the bond this action cannot be maintained for the use and benefit of the county of Maui; (2) that the county ordinance was void; and (3) that the ordinance, if ever in force, was "struck dead" by Act 217 of the Session Laws of 1915 which took effect on April 28, 1915. The ordinance provided that the county engineer should give a bond to the county in the sum of \$5000 for the faithful performance of the duties of his office. The form of the bond was not prescribed by the ordinance and the form used was that provided by statute for territorial officers, the Territory being named as the obligee, although we presume that properly the county should have been made the obligee. But the irregularity did not make the bond invalid. *Murfree on Official Bonds*, Sec. 62; *Bay County v. Brock*, 44 Mich. 45. And it is held that where an improper obligee has been named in an official bond an action on the bond may be maintained in the name of the obligee for the use and benefit of the proper party. *Farr v. Rouillard*, 172 Mass. 303; *Anderson v. Blair*, 45 S. E. (Ga.) 28; *Justices v. Smith*, 25 Ky. 472. In *Farr v. Rouillard* the court said (p. 305), "Treating the bond as a common law bond, it is contended

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by the defendant that only nominal damages can be recovered; but it is plain that the obligor intended to comply with the statute, and therefore, by implication, it was taken in trust for the benefit of the same persons who could take advantage of a bond in the statutory form. The damages, therefore, will be measured by the interest of the *cestui que trust*, not by that of the obligee." So here, this bond evidently was given with the intent to comply with the requirement of the ordinance, and for the protection of the county, and it is more reasonable to suppose that the parties understood that in the event of a breach of condition action would be brought in the name of the Territory for the benefit of the county and its indemnification than that they deliberately put their names to a mere scrap of paper. It is contended that the ordinance was void because under section 1509 of the Revised Laws the chairman of the board of supervisors, who is also its executive officer, "shall exercise and have general superintendence and control over all county affairs, and shall manage the same subject to the advice and direction of said board." We are of opinion, however, that as the board of supervisors possessed the power to pass ordinances and "to appoint such subordinate officers as they may deem necessary for the public service" (R. L. 1915, Sec. 1554) the ordinance providing for the appointment of a county engineer and defining his duties was valid and operative in so far, at least, as its provisions are involved in this case. Finally, it is urged that the provision of Act 217 of the Session Laws of 1915, that the executive officer of the board shall "have the power and right to take charge of all county road work and other public construction work of the county" repealed or nullified the ordinance in question. We do not sustain the contention. The statute conferred authority merely in permissive terms. The abolition of the office of county engineer or the abrogation of the engineer's duties did not necessarily

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result from the enactment of the statute, and it does not appear from the plaintiff's complaint that the executive officer had actually taken over the immediate charge of the roads. On the contrary, the allegation is that the defendant Howell continued to exercise the powers and duties of the office of engineer until August 31, 1915.

We hold that the plaintiff's complaint states a cause of action. It is not difficult to imagine circumstances which would absolve the county engineer from the charge of negligence, such, for example, as that he did not have and could not obtain the funds or means with which to take the necessary steps to protect the traveling public from the danger of the road (see *Taylor v. Manson*, 9 Cal. App. 382, 388) but we need not speculate upon what the evidence upon a hearing may disclose.

The exceptions are sustained and the case is remanded.

E. R. Bevins, County Attorney of Maui, for the Territory.

D. H. Case (*Enos Vincent* with him on the brief) for the defendant Howell.

Marguerite Ashford (*Castle & Withington* with her on the brief) for the surety.

Syllabus.

EUGENE MURPHY *v.* MAUI PUBLISHING COMPANY, LIMITED, A DOMESTIC CORPORATION.

No. 1023.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED JUNE 12, 1917.

DECIDED JULY 5, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

EVIDENCE—*publication of libel.*

The publication of a libelous article in defendant's newspaper is sufficiently shown by production of a copy of the newspaper containing the libelous article and by evidence that the morning following the issue of such newspaper a third party called plaintiff's attention to the article and that ten or twelve persons later spoke to him about it where an inspection of the article shows that no one could tell that it referred to the plaintiff without reading the body of the article.

LIBEL AND SLANDER—*attorney—misconduct.*

An article printed in a newspaper to the effect that an affidavit had been filed in a civil case stating that plaintiff, an attorney, had settled a case without the knowledge or consent of his client imputes malpractice or professional misconduct to the plaintiff and is libelous *per se*.

SAME—*presumption of malice.*

The law presumes malice from the publication of a libel that is actionable *per se* and it is not necessary to prove actual malice.

SAME—*privileged communication.*

The privilege extended to a litigant to charge in a judicial proceeding libelous matter pertinent to the issues therein does not extend to third parties or the press. The republication of libelous matter contained in the pleadings or other papers in civil actions prior to hearing is an adoption and indorsement of such libelous matter by the one republishing it and such republication is not privileged.

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APPEAL AND ERROR—exceptions—point not raised in trial court.

On exceptions the appellate court will not consider the question of excessive damages when that question was not raised in the trial court by exception or by motion for a new trial based on the ground that the damages awarded are excessive.

OPINION OF THE COURT BY QUARLES, J.

This action was commenced by the plaintiff against the defendant, a domestic corporation, to recover damages by reason of an alleged libel published in the Maui News, a newspaper published by defendant, the alleged libel being as follows:

“Didn’t know case had been settled. Hawaiian litigant wants suit reopened—says his attorney acted without his knowledge.

“Application for a motion to set aside a stipulation in the case of J. W. Ambrose vs. Kealakaa, was granted yesterday by Judge Edings, and the motion will be heard on Saturday, February 17.

“The proceeding, which was instituted by Attorney E. R. Bevins, contemplates the re-opening of the case in question which was settled by agreement out of court some months ago. The petition alleges that the settlement was made by Eugene Murphy, then attorney for Kealakaa, without his client’s knowledge or consent, and to his subsequent. The case involves a valuable piece of beach property at Lahaina claimed as a part of the Bishop Estate, and also by Kealakaa claims it by adverse possession.”

The defendant plead the general issue and the cause was tried by the court jury waived. At the conclusion of plaintiff’s evidence the defendant moved for a nonsuit upon various grounds, which motion was denied. The court rendered its decision in favor of the plaintiff and awarded his damages at the sum of one thousand dollars, for which judgment was entered. The cause comes before us upon two exceptions, one to the refusal of the trial court to grant

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the motion for a nonsuit and the other to the decision in favor of the plaintiff. Both exceptions raise the same questions.

The evidence shows that the defendant publishes a newspaper called the Maui News which has a weekly circulation of more than six hundred and is circulated largely on the island of Maui, where plaintiff resides and is engaged in practice as an attorney at law, and also in the other islands of the Territory; that the issue of February 9, 1917, in which was published the alleged libelous article, was a special edition, of which about six hundred and fifty copies were issued and circulated; that the article in question was written by Mr. Cooper, the manager of the defendant and editor of its newspaper; that he wrote the article in duplicate, sending one copy to the evening Star-Bulletin, a daily paper published in Honolulu with a circulation of between six and seven thousand, and which article was published in the last named paper in its issue of February 9, 1917; that the attention of the plaintiff was called to the article in question on Saturday morning, the day after its publication, by one Leon Straus, and that ten or twelve other persons spoke to the plaintiff about the article; that this libelous article has not, so far as plaintiff knows, injured his business, but it annoyed him and prevented him from eating normally for three or four days. The following facts led up to the publication of the article in question: The plaintiff was employed by one Kealakaa, the defendant in an action of ejectment instituted by J. W. Ambrose as plaintiff; this action was continued on account of the absence of the attorneys for the plaintiff at the March and June terms 1916 of the circuit court of the second judicial circuit, wherein said action was pending; at the October term 1916 the plaintiff advanced the cost money necessary to secure the attendance of a witness for the defendant from Hono-

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lulu at the trial in Wailuku; the morning the case was set for trial the defendant, in the presence of others, agreed with W. O. Smith, one of the attorneys for the plaintiff in the ejectment suit, to a settlement of the case, the plaintiff to pay the costs, whereupon the defendant Kealakaa, W. O. Smith and others went to the office of the plaintiff and informed him that the case had been settled and was to be discontinued, the plaintiff to pay the costs including those incurred by the defendant; to this arrangement the plaintiff objected, insisting that he could win the case, but he finally acquiesced saying that the defendant had a right to agree to a settlement if he so desired; following this agreement a stipulation was prepared showing the terms of settlement, which plaintiff signed, the costs were paid and the cause discontinued. The stipulation was not introduced in evidence and is not before us, nor is any reason shown why it was not introduced in evidence or its contents agreed to or shown. After the expiration of the October term 1916 and on February 2, 1917, a motion to set aside the stipulation and discontinuance was prepared by E. R. Bevins, as attorney for Kealakaa, together with the affidavits of said Kealakaa and one Joseph Kekoa, to the effect that Kealakaa did not understand the English language and that at the settlement of the action of ejectment, the stipulation, which was in English, was not explained to Kealakaa in Hawaiian and he did not understand the same or agree thereto. This motion came on to be heard on the 17th day of February, 1917, before the judge of the second judicial circuit, evidence was introduced pro and con and the motion was denied. These facts were proven without dispute at the trial of the case at bar and it is thus seen that the statements contained in the motion and affidavits referred to were false.

We will now proceed to consider the several points urged on behalf of defendant: (1) The defendant contends that

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there is no evidence to show that it published the alleged libel in that it was not proven at the trial that the alleged libelous article was read by any particular person. The appearance of the article in the copy of defendant's newspaper introduced in evidence and the evidence of Mr. Cooper show the printing of the article in question by defendant and the circulation of more than six hundred copies of defendant's newspaper containing the alleged libel. The evidence of the plaintiff that the article was called to his attention by Mr. Straus the morning following the printing of it and that ten or twelve persons spoke to him about the article is sufficient to show that the article was read by others. An inspection of the article would show that no one could tell from the headlines that it referred to plaintiff, and in order to do so it was necessary to read the body of the article. The evidence is sufficient to show the publication by the defendant.

(2) It is contended on behalf of the defendant that the alleged libelous words are not actionable in their natural and primary signification, not actionable *per se*, and that no special damage was shown, therefore the judgment should have been in favor of the defendant. The article referred to the plaintiff's professional conduct, affected him in his professional business, and imputed to him malpractice or professional misconduct. Section 2329 R. L., which relates to practicing attorneys, is as follows:

"Control of action; power to settle. The practitioners so licensed shall have control to judgment and execution, of all suits and defenses confided to them; provided, however, that no such practitioner shall have power to compromise, arbitrate or settle such matters confided to him, unless upon special authority in writing from his client."

To charge an attorney with settling a pending case without the knowledge or consent of his client is to charge him with professional misconduct, and where the charge is in

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writing it is libelous *per se*, and it is not necessary to allege or prove special damages. "It is libelous to impute to any one holding an office that he has been guilty of improper conduct in that office, or has been actuated by wicked, corrupt or selfish motives, or is incompetent for the post. So it is libelous to impute to a member of any of the learned professions that he does not possess the technical knowledge necessary for the proper practice of such profession, or that he has been guilty of professional misconduct" (Newell, Slander & Libel, 3 ed. p. 75, par. 42). See also *Atkinson v. Detroit Free Press*, 46 Mich. 341; *Cramer v. Riggs*, 17 Wend. 209; *Atwater v. Morning News Co.*, 67 Conn. 504; *Sillars v. Collier*, 151 Mass. 50; *Boydell v. Jones*, 4 M. & W. 446; *Secor v. Harris*, 18 Barb. 425; *Register Newspaper Co. v. Worten*, 111 S. W. (Ky.) 693; 25 Cyc. 333. When the natural and probable consequence of a printed libelous publication will injure one's professional reputation or cause him pecuniary loss, such publication is libelous *per se* (Newell, Slander & Libel, 3 ed. p. 217). A charge of malpractice or professional misconduct against a physician or attorney naturally tends to harm him in his profession and to deprive him of business by causing persons contemplating employing him to withhold their patronage from him. Naturally the extent of such loss is unknown to the injured party. The plaintiff in the case at bar says that he knows of no business he has lost by reason of the alleged libelous publication, but it is natural for a person contemplating employing a professional man, and deterred from so doing by reason of a charge of professional misconduct published against him, to refrain from going to him and telling him that he expected to employ him but did not do so because he saw that he had been charged with malpractice or professional misconduct. Delicacy naturally prevents one from approaching another under such circumstances. It is apparent that the tendency of the libelous

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article in question here is to cause pecuniary loss to the plaintiff. Whether he is able to point out just what business he has lost by reason of it or not we hold that the libelous publication complained of is actionable without allegation and proof of special damage.

(3) The defendant contends "that there is not a scintilla of evidence in this case showing malice on the part of the defendant in the publication of said libel." The law presumes malice from the publication of a libel that is actionable *per se* and it is not necessary to prove actual malice (Newell, Slander & Libel, 3 ed., p. 217).

(4) It is next contended on behalf of the defendant that the publication of the libelous matter was privileged; that the same is a fair, true and impartial report of an affidavit filed in a judicial proceeding. It is well settled that a newspaper is privileged to publish a report in a judicial proceeding after a hearing therein, provided it gives a fair report of what took place. The privilege extended to a litigant or a witness or to counsel to state libelous matter pertinent to the issues in a judicial proceeding does not extend to third parties in civil cases, whether individuals or newspapers, as the public has no interest in a private controversy. "There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing mischief with impunity can be devised than filing papers containing false and scurrilous charges, and getting them printed as news. The public have no rights to any information on private suits till they come

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up for public hearing or action in open court; and when any publication is made involving such matter they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or on trial the case may easily fail of proof or probability. The law has never authorized any such mischief. It has been uniformly held that the public press occupies no better ground than private persons publishing the same libelous matter, and, so far as actual circulation is concerned, there can be no question which is more likely to spread them" (Newell, Slander & Libel, 3 ed., pp. 569, 570). See also 25 Cyc. 407; *Park v. Detroit Free Press Co.*, 72 Mich. 560; *Cowley v. Pulsifer*, 137 Mass. 392; *Meriwether v. Knapp & Co.*, 211 Mo. 199, 219; *Isley v. Sentinel Co.*, 133 Wis. 20; *Amer. Pub. Co. v. Gamble*, 115 Tenn. 663. In *Brown v. Globe Printing Co.*, 213 Mo. 611, the court, at page 643, quotes with approval from *Hotchkiss v. Oliphant*, 2 Hill 510, as follows: "The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and when called on by the aggrieved party, the publisher should be held strictly to proof. If he chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there is no ground for complaint if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against

Coke, J., concurring.

private character before they are published and circulated throughout the community."

It follows that the libelous matter complained of is not privileged and as its truth was not established, but its falsity shown, the defendant was properly held liable.

Counsel for defendant complains that the judgment for one thousand dollars damages in favor of the plaintiff is excessive. The defendant did not make this ground the basis of an exception and there is nothing in the record showing that this point was called to the attention of the trial court by motion for a new trial or otherwise, hence this question is not before us for consideration (3 C. J. p. 944, §829). It is well settled that an exception must be sufficiently definite and specific to point out to the appellate court a point of law which was called to the attention of the trial court affecting the legality of its ruling, the trial court having had the opportunity to correct its ruling if erroneous (*Ripley & Davis v. Kapiolani Est.*, 22 Haw. 507; *Scott v. Kona Development Co.*, 21 Haw. 258, 263).

The exceptions are overruled.

W. B. Pittman (*Andrews & Pittman* on the brief) for plaintiff.

Enos Vincent (*D. H. Case* with him on the brief) for defendant.

CONCURRING OPINION OF COKE, J.

In concurring in the majority opinion I do so mindful that in a government like ours, characterized by free institutions, the importance of a free press should not be underestimated. While the case at bar deals solely with the publication of libelous matter contained in the pleadings in a civil action prior to a hearing thereon, I deem it timely to draw attention to what I understand to be a relaxation to some extent of the rule announced when the same is ap-

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plied to criminal proceedings. For instance, a report of an arrest on information gained from papers on file, when such report does not assume the guilt of the accused person and is not otherwise defamatory, is privileged. This policy of the law is recognized by Mr. Townshend in his work on Slander and Libel, 3d ed., p. 403, and in Newell's Slander and Libel, 3d ed., p. 664.

TERRITORY v. MURAKAMI TSUNEKICHI.

No. 1025.

RESERVED QUESTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED JULY 3, 1917.

DECIDED JULY 13, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

CHATTEL MORTGAGES—*definition.*

A chattel mortgage is a transfer of the title, or right to acquire title, to personal property as security for the payment of money, or performance of some other act, upon condition that if the transferrer performs the specified act the title shall revert in him. The right to terminate the transferee's interest is a fundamental characteristic.

SAME—*instrument examined and held to be an executory contract and not a mortgage.*

A planter agreed in writing to sell such sugar cane as he might raise upon his land during two years to a plantation. The plantation advanced money and agreed to make further advances upon the security of the crops and the indenture, also to

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purchase the cane and pay for the same at a specified price per ton of sugar which it would manufacture from the cane based upon the price for the time being of ninety-six degree polarization sugar in New York City. The plantation was given the right to deduct the amount of advances from the purchase price, and it was agreed that in case of default on the part of the planter the plantation should have the right to cancel the agreement or enter upon the land and take possession of the growing crops, if any, and harvest the same. And it was provided that the agreement should continue in force for the full period notwithstanding the payment by the planter of all indebtedness. Held, that the instrument was not a mortgage, its whole tenor being against the idea of a transfer of the title, or the right to acquire title, to the crops of cane as security for the performance of a condition which, if performed, would divest the transferee's interest therein.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant was charged under five counts with having unlawfully attempted to remove certain sugar cane which was growing upon Lot No. 7, Kaiwiki Homesteads, District of South Hilo, County of Hawaii, with unlawfully removing the same, with attempting to aid and abet, and with aiding, abetting and assenting to the removal of the same by the Kaiwiki Milling Company, Limited, with fraudulent intent to place said sugar cane beyond the control of the Hilo Sugar Company, the mortgagee thereof, contrary to the provisions of section 3998 of the Revised Laws.

Upon the trial the prosecution had put in evidence an instrument executed on the 22d day of July, 1915, by the defendant and the Hilo Sugar Co., which the prosecution claimed, and the defense denied, was a mortgage of the sugar cane to be planted by the defendant on his premises at Kaiwiki; also a bill of sale of the same cane by the defendant to the Kaiwiki Milling Co., Ltd., dated the 30th day of August, 1915. And evidence was introduced show-

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ing that on or about the 12th day of May, 1917, the Kaiwiki Milling Co., with the consent of the defendant and against the expressed wishes of the Hilo Sugar Co., cut and removed to its mill and beyond the control of the Hilo Sugar Co. about seventy-five tons of said cane. The prosecution having rested the defendant moved that the jury be instructed to return a verdict of acquittal on the ground that the instrument of July 22, 1915, was not a chattel mortgage within the meaning of R. L. 1915, Sec. 3998, and the offense charged had not been proven. Thereupon the court reserved for the consideration of this court the questions whether the said instrument was a mortgage, and whether the defendant's motion for a directed verdict should be granted. The material portions of the agreement are as follows:

"This agreement, made this 22nd day of July 1915 by and between Murakami Tsunekichi, party of the first part, hereinafter called the Planter (and if the Planter consists of more than one person this agreement and all covenants binding on the Planter are both joint and several), and Hilo Sugar Company a corporation, party of the second part, hereinafter called the Plantation, Witnesseth:

"That Whereas the Planter proposes to plant and cultivate sugar cane during the term hereinafter specified upon certain lands situate in the District of Hilo, Island and Territory of Hawaii, thus described:

"Lot No. 7 Kaiwiki Homesteads,

"(7 Acres Caledonia Plant Cane, Crop 1917)

"And Whereas the Planter has agreed to sell and deliver to the Plantation all crops of cane which may be grown and matured upon said lands during said term, and the Plantation is willing to make certain advances to enable the Planter to plant, cultivate and harvest such cane, upon the security of such crops and of this indenture:

"Now Therefore, in consideration of the sum of Fifty Three 15/100 (\$53.15) Dollars to the Planter loaned and advanced by the Plantation, the receipt whereof is hereby acknowledged, and in consideration of the agreements of

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the Plantation hereinafter contained, and in further consideration of such loans and advances as at any time may be made by the Plantation to the Planter (whether in cash or in materials furnished or services rendered) for the purpose of assisting him to plant, cultivate and/or harvest such sugar cane, or otherwise under the security of this indenture, the Planter does hereby agree to sell, assign, transfer and deliver, and does hereby sell, assign, transfer and deliver to the Plantation all sound sugar cane (free from trash, tops, moisture, dirt or other refuse, and excluding all dry and sour cane), which may mature upon said lands during the term of two years from 22nd day of July 1915;

"To Have and To Hold unto said Plantation, its successors and assigns, forever.

"And for said consideration the Planter does hereby covenant and agree with the Plantation that he will pay to the Plantation, upon demand, said sum now loaned and advanced and all other and further sums which may be loaned and advanced or chargeable to him by the Plantation hereunder, together with interest thereon at the rate of eight per cent. per annum; and will well and truly pay all taxes, assessments and all other charges whatsoever, whether laid upon said crops or lands or otherwise laid, the non-payment of which might be prejudicial to the security or rights of the Plantation hereunder, and will do and perform every other matter or thing requisite to maintain the security of the Plantation hereunder; and will not, without the written consent of the Plantation, sell, assign or transfer by way of mortgage or otherwise to any person other than the Plantation said crops, or any part thereof, or interest therein, during the term hereof; and, when so required by the Plantation, will cut, and deliver to the Plantation at the flumes of the Plantation, on said lands, or at such other place or places as may be mutually agreed upon, all sound sugar cane (free from trash, tops, moisture, dirt, or other refuse, and excluding dry and sour cane) grown and matured as aforesaid during said term; and that all advances and all reasonable charges for materials furnished or services performed hereunder by the Plantation, for the account of the Planter, with interest thereon as aforesaid, shall be secured hereby and shall be a charge

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against the purchase price of said cane, and deductible by the Plantation before any payments of such price are made to the Planter.

“And for said consideration the Planter does hereby grant to the Plantation, during said term, free of charge, all such rights of way over and across said lands as may be necessary, to take off the cane grown on said lands or on any other lands so located that such rights of way are necessary for taking off cane therefrom.”

Then follow certain provisions in regard to the furnishing to the planter of seed cane for planting and flumes for taking off the crop, concerning the quality of the cane, and the agreement of the plantation to purchase the cane and specifying the price to be paid therefor based upon the price for the time being of ninety-six degree polarization sugar in New York City. And then follow these paragraphs:

“But in case of any default on the part of the Planter to well and truly pay, upon demand, any sum or sums advanced or chargeable to him hereunder, or otherwise to well and truly perform any or all the covenants and agreements by the Planter made herein, then the Plantation may at its election cancel this agreement, and recover from the Planter all such sums already advanced or chargeable to him hereunder, with interest as aforesaid, or may enter upon so much of the above described lands as may be cultivated in cane and take full possession of the same and of the crops growing thereon, and so long as may be necessary to reimburse itself in such sum or sums, not exceeding the remainder of the term hereof, may carry on, as though conducting its own business, the work of cultivating and harvesting such crops and any ratoon crops therefrom, charging to the Planter the full cost thereof, including labor, superintendence, materials and all such other proper costs, charges and advances, as it may deem reasonably necessary, with interest thereon as aforesaid—all of which shall be repayable under and secured by this indenture. All sugar manufactured from cane received or taken by the Plantation from such lands shall be credited to the Planter

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at the prices aforesaid, and after all proper charges and deductions of every kind shall have first been made, the net balance, if any, remaining shall be made over to the Planter.

"Entry and operation by the Plantation as aforesaid shall not deprive the Plantation of the right to thereafter cancel this contract for any cause herein provided for, if it so elect.

"It is understood and agreed that payment at any time of all indebtedness of the Planter to the Plantation shall not operate as a cancellation of this agreement, but the same shall nevertheless continue in force during the full term herein specified.

"And it is mutually agreed that this indenture shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives and successors in interest."

On behalf of the prosecution it is contended that the instrument is of a two-fold character, viz., (1) a contract for the sale of the cane therein named, by the defendant to the Hilo Sugar Co., for a period of two years from and after the 22d day of July, 1915; and (2) a chattel mortgage securing (a) the repayment of \$53.15, the amount therein acknowledged to have been received by the defendant, (b) future advances, if any, and (c) the performance of other covenants and conditions therein named to be performed by the defendant, including the covenant to sell cane to the Hilo Sugar Co. as set forth in said instrument. And counsel say that "An inspection of the instrument itself shows that it expressly purports to secure (a) and (b), and it was argued at the trial and is again urged in this court that said instrument should be construed to secure (c) as well. However, this last named contention as to (c) is in no way essential to the prosecution's case, for if the instrument sufficiently secures the repayment of \$53.15, as set forth in (a), the prosecution will not have to rely upon the hypotheses set forth in (b) and (c)." In this

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connection counsel lay emphasis upon the fact that the consideration was stated to be the sum loaned the planter and future advances to be made to him "under the security of this indenture," and that the planter agreed that all advances and all reasonable charges for materials and services, with interest thereon, "shall be secured hereby," and cite authority to the effect that a bill of sale of personal property declared to be made to secure borrowed money is a mortgage. But taking all the provisions of this instrument as expressing the entire transaction between the parties there will be found to be lacking any provision, express or inferable, giving the party of the first part the right to divest the title or claim of the party of the second part by performance of a condition, which is the fundamental characteristic of a mortgage. "A chattel mortgage may be defined as a transfer of the title to personal property, as security for the payment of money or performance of some other act and subject to the condition that, if the transferrer performs the specified act, title shall revert in him. There is some dissent from this definition in regard to whether title passes to the mortgagee, and many courts, influenced by the prevailing doctrine regarding real-estate mortgages, have held that legal title does not pass to the mortgagee but that he merely gets a lien." 6 Cyc. 985, 986. In this jurisdiction it has been held that title to the property does not pass to the mortgagee unless or until he takes possession of it. *Wundenberg v. Campbell*, 9 Haw. 203, 209; *Phillips v. McChesney*, 8 Haw. 289. The right to terminate the transferee's interest is essential to a mortgage. Jones on Chattel Mortgages, Secs. 8, 17; 11 A. & E. Enc. Law (2d ed.) 207; *Kahau v. Booth*, 10 Haw. 332; *Horton v. Hovater*, 66 So. (Ala.) 939; *Flanders v. Chamberlain*, 24 Mich. 305, 309; *Goddard v. Coe*, 55 Me. 385; *Fairfield Bridge Co. v. Nye*, 60 Me. 372, 378; *Weeks v. Baker*, 152 Mass. 20.

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We regard the instrument in question as an executory contract which by its terms was to continue in force for the term of two years. The planter agreed to sell and deliver to the plantation all the sound sugar cane which he might raise and bring to maturity upon his land during that period. He did not bind himself to plant any cane, but only to sell to the plantation such cane as "may mature upon said lands during the term of two years." The plantation agreed to buy and pay for the cane at a specified price per ton of sugar which it would manufacture from the cane based upon New York quotations. The plantation also agreed to make advances which the planter agreed would be a charge against the purchase price of the cane and deductible therefrom. There was no clause of defeasance—no condition to be performed which would terminate the interest of the party of the second part—and none can be implied in face of the provision that the agreement should continue in force for the full term notwithstanding the payment by the planter of all indebtedness. The right of the plantation was not merely to have back the amount of money advanced, with interest, but the right to have the cane to manufacture into sugar with the opportunity of making a profit out of the process. What was referred to as "the security" of "such crops" and "of this indenture" was the right given the plantation to deduct the amount due from the planter from the purchase price of the cane and, in case of default on the part of the planter, to enter upon the land and cultivate and harvest the crops. No power of sale in the event of a default on the part of the planter to perform his agreements was given to the plantation. And in case of the failure of the party of the first part to carry out the contract the remedy of the party of the second part would not be by bill in equity to foreclose an equity of redemption, but to cancel the agreement or enter upon the land and take possession of

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the crops growing thereon, if any, and harvest the same, as provided in the contract, or by an action at law for damages for breach of contract. The whole tenor of the instrument is against the idea of a transfer of the title, or a right to acquire title, to the crops of cane as security for the performance of a condition which, if performed, would divest the transferee's interest therein. We hold, therefore, that the instrument in question was not a mortgage.

We have examined the cases of *Minnesota Oil Co. v. Maginnis*, 32 Minn. 193, and *Frankhouser v. Fisher*, 54 Kan. 738, cited in the prosecution's brief. Neither of them is on all fours with the case at bar. The latter is clearly distinguishable, and in so far as the former may be inconsistent with the views herein expressed we do not agree with it.

The circuit court is advised that the charge was not sustained by the evidence, and that the defendant's motion for a directed verdict of acquittal ought to be granted.

B. Knollenberg (*W. H. Beers*, County Attorney of Hawaii, *Frear, Prosser, Anderson & Marx* and *C. F. Parsons* on the brief) for the Territory.

J. W. Russell for defendant.

RESOLUTIONS OF THE BAR.

RESOLVED, that the members of the Bar Association of Hawaii desire to express their sorrow at the death of JOHN ALFRED MAGOON, who had for many years been a member of the Bar of the Supreme Court of Hawaii and of this Association.

Mr. Magoon was an able member of the Bar of this Court under the Monarchy, the Republic and the Territory of Hawaii. He was vigorous and active in both mind and body and fearless in pursuing the course which he deemed to be right. His mortal life has been arrested in its prime and the news of his accidental death was a great shock to his friends and those dear to him.

The members of this Association desire to express their deep sympathy for the widow and family of our deceased brother.

RESOLVED, that a copy of this Resolution be spread upon the records of this Court, and a copy be sent to the family of our deceased friend.

Honolulu, September 5, 1916.

RESOLVED, that the Bar Association of Hawaii would hereby express its sense of the loss sustained by said Association and by the Bar of this Territory, in the recent death of our brother ABRAM STEPHANUS HUMPHREYS, which event occurred in this city, August 19, 1916, as the result of a lingering illness which was borne with exemplary patience and fortitude.

The brother whose untimely death we now lament was stricken down in the prime of his life and intellectual powers. Born in Mississippi forty-eight years ago, he was admitted to the Bar upon attaining his majority, and, after a period spent in practice in Arizona, he came to Hawaii

where he was admitted to this Bar in 1896, since which year he continued to practice among us.

Upon the organization of the Government of this Territory he was appointed by President McKinley as First Judge of the Circuit Court for the First Circuit, the duties of which position he continued to discharge with signal ability from the date of his qualifying, July 5, 1900, until his voluntary retirement, by resignation, August 31, 1902.

Judge Humphreys was an able and picturesque example of the courtesy, the chivalry and devotion to duty of the type of lawyer for which the Southern section of our Union has long been justly famed. Prompt, energetic, and indefatigable in the execution of his professional duties; he also possessed and displayed those qualities of mind and heart which endeared him to a wide circle of friends, within and without the profession.

This Association hereby most respectfully tenders to the sorrowing family and relatives of our deceased brother, the condolences of its members in respect of their irreparable loss.

RESOLVED, that this Resolution be spread upon the minutes of this Court, and that a certified copy thereof be transmitted to the widow and family of Judge Humphreys.

Honolulu, September 5, 1916.

WHEREAS, CECIL BROWN, one of the senior members of the Bar of this Court and of the Bar Association of Hawaii, died in this city on the sixth day of March, 1917,

RESOLVED, that the members of this Bar hereby express their sorrow at the loss of their esteemed brother who has been called hence:

That we hereby record our appreciation of his integrity and ability, and of the service he for many years rendered both to the Court and to the State, and do deeply mourn

the loss which the community has sustained in his death:

That we tender to the members of his family our sincere sympathy in their loss; and

That these Resolutions be entered upon the records of this Court.

Honolulu, May 7, 1917.

WHEREAS, on the 4th day of January, 1917, ARTHUR ASHFORD WILDER, a member of the Bar of Hawaii and formerly an Associate Justice of the Supreme Court of the Territory, was taken from us by death:

BE IT RESOLVED, that the Bar of Hawaii hereby testify to its affection and respect for Judge Wilder and its appreciation of his integrity and ability as a lawyer and as a judge, and that the Bar hereby express its deep sense of the loss which Hawaii has sustained in his demise. In the preparation for his profession, though without the advantage of a college training enjoyed by many of his fellows, he at the Law School of Yale University graduated as leader in scholarship of a large and unusually able class. For a year after graduation he continued his studies at Yale in special fields of law and jurisprudence. The promise of his record as a student was fulfilled in ample measure in his work as a lawyer and as a judge. His social qualities and his strong and interesting personality endeared him to many. The loss of such a man is the more deeply to be regretted here because of the fact that he was in substantial degree of the blood of the native people of Hawaii, and in his success and attainments, exemplifying the highest development of that people, they may well have pride.

AND NOW BE IT RESOLVED FURTHER, that these Resolutions be spread upon the records of this Court.

Honolulu, May 7, 1917.

WHEREAS, we have learned, with deep regret, of the passing away on June 21, 1917, of our brother member of this Bar, ARTHUR K. OZAWA; and

WHEREAS, he was the first, if not the only member of our profession born of Japanese parentage to be admitted to the practice of law within the jurisdiction of the United States and in the Territory of Hawaii; and

WHEREAS, his loyalty to his professional obligations, his patriotic American citizenship derived through his birth in Hawaii, and his high standards of integrity in his professional and everyday life, endeared him to all who knew him; Now therefore be it

RESOLVED, That the Bar of this Court has lost a valuable, efficient and influential member whose personality was a cogent factor among the race of his kindred in disseminating a knowledge of and respect for our laws, and their upholding;

That a copy of these Resolutions be sent to his family and that the same be spread upon the records of this Court.

Honolulu, July 3, 1917.

WHEREAS, JOHN RICHARDSON, a member of the Bar of this Court, has responded to the summons from the Great Tribunal and has gone from us:

BE IT RESOLVED, that we hereby record our sorrow at the loss of our friend and brother, and our regard for his memory and appreciation of the service which he rendered in the Courts of these Islands and in public affairs.

We would pay tribute to his fortitude and courage during the many long years of helplessness caused by a fatal

malady, which entirely disabled him from active service, and which he met with patient endurance.

We would express our "Aloha" for our departed brother.

RESOLVED, That these Resolutions be spread on the minutes of this Court and a copy sent to the family of the deceased.

Honolulu, July 3, 1917.

WHEREAS, it has pleased God to take from among us JOHN L. KAULUKOU, a member of the Bar of this Court, Be it

RESOLVED, That the members of the Bar of this Court record their appreciation of the qualities of high courtesy, unfailing dignity and uprightness which marked the life of this typical Hawaiian lawyer and gentleman:

RESOLVED, that we tender to the surviving relations of the deceased our heartfelt sympathy:

RESOLVED, that these Resolutions be presented to the Supreme Court and be spread upon the records thereof.

Honolulu, July 3, 1917.

RULES OF THE SUPREME COURT.

RULE 16. ADMISSION TO THE BAR.

(As amended April 25, 1916 and May 7, 1917.)

1. Each applicant for admission to the bar shall file with the clerk an application setting forth his name, age, nationality, last place of residence, the character and term of his study, and, if he has been admitted to the bar of any other court, that he is in good standing. Sufficient certificates of the applicant's good moral character, and, if he is a member of the bar of any other court, the certificate of admission to such bar, shall accompany the application.

2. No applicant who is not a member of the bar of the highest court of some other state, territory or country, or a graduate of a law school of recognized standing, will be admitted to practice in this court unless he shall have studied diligently at least three years in a law school or the office of a competent attorney, or partly in such school and partly in such office, and shall have passed an examination which satisfies the court that his legal qualifications are sufficient. No correspondence course, extension course, or other course or period of home study will be accepted as the equivalent of the requirement of graduation from a law school or of actual study in a law school or in the office of a competent attorney under this rule.

3. If the applicant has been admitted to practice before the highest court of some other state, territory or country, or is a graduate of a law school of recognized standing, he shall be admitted here without examination as to his legal qualifications except that he may be required to pass an examination on local practice and statutory law.

4. No person who is not a citizen of the United States

will be admitted unless he shall have bona fide declared his intention to become a citizen in the manner required by law.

5. No applicant whose application has been denied shall apply again for admission within six months thereafter.

6. Regular examinations of candidates for admission to the bar will be held in Honolulu in the months of January, April, July and October.

7. No attorney who has been disbarred shall be readmitted to practice unless he is possessed of the qualifications required by this rule for examination for admission to practice as an original applicant. His application shall show that he has complied in good faith with the order of disbarment, and any other reasons he may have to show why he may properly be reinstated.

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A suit by a resident taxpayer to restrain the illegal expenditure of public money will not be dismissed because of the death of the complainant after a decree has been entered in his favor and after the time for the filing of his brief in the supreme court on an appeal by the respondents has expired but the appeal will be decided *nunc pro tunc* as of a day prior to the death of the appellee. *Wilder v. Pinkham*, 571.

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Ordinarily a gift of an annuity to a person, without words of limitation or other significant language is to be regarded as a gift of the annuity during the life of the annuitant, but where an annuity is given to one for a specified period of time, an intent is to be inferred that it was not to terminate with the life of the annuitant. Held, accordingly, that where property was given by will to a trustee to hold until the death of the last survivor of a number of annuitants and for twenty-one years thereafter to pay certain annuities and to accumulate the unapplied income, and then divide the trust estate "among those persons entitled at that time to the aforementioned annuities," an annuity payable to the children of S. P. "for life and then to their heirs" the interest of the heirs in the annuity was for the entire period of the trust, and upon the death of one his share became payable to his heirs. *Hawaiian Trust Co. v. McMullan*, 685.

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APPEAL AND ERROR.

1. *Annulment of decree by writ of error—divorce.*

Where, in a divorce case, a decree is rendered granting the wife, as libellant, a divorce and alimony the defendant sues out a writ of error for the purpose of reviewing the said decree, but dies during its pendency in the supreme court, the decree is not annulled by the issuance of the writ of error, and the libellant therein is not the widow of the libellee notwithstanding she filed in the supreme court, after the death of the libellee, a confession of error, no judgment, order or mandate having been made in the supreme court reversing the decree of divorce. *Bertelmann v. Kaio*, 646.

2. *Appeal from decree of land court.*

Under Sec. 3145, R. L. 1915, an appeal from a decree of the land court may be taken to the supreme court upon points of law only. *McCandless v. Du Roi*, 51.

3. *Appeal from equity decree.*

The proceeding in the supreme court upon an appeal from a decision of a circuit judge sitting in equity is not a hearing *de novo*, but a review of the decree and of the issues determined thereby. *Wilder v. Pinkham*, 571.

4. *Bill of exceptions—extension of time.*

While an order extending the time in which to present a bill of exceptions indefinitely would be void, yet an order made within the time in which the bill of exceptions might have been presented, extending the time for presenting the bill of exceptions *twenty days after typewriting and filing transcript of the evidence by the official court stenographer with the clerk of the court*, is not void for uncertainty; reference in the order to the filing of the transcript of the evidence made the time of extension certain, fixed and definite. *Weinzheimer v. Kahaulelio*, 374.

5. *Certificate of appeal—points of law.*

On appeal from a judgment of a district magistrate to this court the points of law upon which the appeal is taken must be stated in the district magistrate's certificate of appeal and if not so stated the appeal must be dismissed. *Murphy v. McKay*, 173.

6. *Criminal procedure—remanding cause for further proceedings.*

When the trial court sustains a demurrer to a criminal charge, discharging the defendant from custody, and on writ of error the order sustaining the demurrer is reversed, the cause will be remanded to the trial court for further proceedings. *Ter. v. Hilo Mercantile Co.*, 409.

APPEAL AND ERROR—Continued.

7. *Criminal procedure—writ of error by Territory.*

A writ of error at the instance of the Territory, under R. L. 1915, Sec. 2520, will not lie in a case where a demurrer to an indictment was sustained on the ground that the indictment was defective merely upon principles of criminal pleading. *Ter v. Belliveau*, 546.

8. *Statute upon which indictment founded.*

Statutes relating to the form and sufficiency of indictments are not statutes "upon which the indictment is founded" within the meaning of R. L. 1915, Sec. 2520. *Ter. v. Belliveau*, 546.

9. *Dismissal of writ.*

In an action for summary possession, where defendants bring error to review the judgment of a circuit court in plaintiff's favor, the writ will be dismissed on motion where it is made to appear that the judgment and execution thereon have been fully satisfied before the suing out of the writ. *Novite v. Ham Pong*, 65.

10. *Equity procedure—dismissal.*

It is reversible error for a circuit judge, sitting in equity, to dismiss plaintiff's bill during the cross-examination of a witness for the defendant, thereby preventing further cross-examination of such witness, thereby taking from the defendant the opportunity of offering further evidence and thereby denying to the plaintiff the opportunity of offering evidence in rebuttal. *Halama v. Halama*, 254.

11. *Exceptions—order granting new trial.*

For the purpose of exceptions an order granting a new trial is regarded as a final order. *Martin v. Wilson*, 74.

12. *Statement of case—briefs.*

A summary of the evidence contained in the appellant's brief which is not controverted by the appellee may be adopted by the court as being a fair statement of the case. *Martin v. Wilson*, 74.

13. *Instructions—harmless error.*

Where on the trial of an action at law the evidence is such that the verdict must necessarily be for the plaintiff, errors in the giving or refusing of instructions which do not affect the measure of damages are harmless. *Pilipo v. Scott*, 26.

14. *Instructions—directed verdict.*

Where there is any doubt as to the proximate cause of an injury for which damages are sought, or such injury may have resulted from one of two or more acts of negligence, the question of proximate cause should be left to the jury, and it is error in such case to instruct the jury to find for the defendant. *Hughes v. McGregor*, 156.

APPEAL AND ERROR—Continued.

15. *Same—same—new trial.*

Where there is, in an action to recover damages for an injury alleged to have been sustained by plaintiff through the negligent acts of the defendant, evidence from which the jury might find the defendant negligent as alleged, it is error to instruct the jury to find for the defendant, and where so instructed, a new trial will be granted. *Hughes v. McGregor*, 156.

16. *Necessity of raising question in trial court.*

In a jury waived case a general exception to the decision is too general to bring to the appellate court a question of law which has not been called to the attention of the trial court. This is in accordance with the well settled rule that questions not properly reserved for review in the trial court will not be noticed on appeal. *Kennedy v. Sniffen*, 115, 119.

17. *Necessity of raising question in trial court—exception to rule.*

In a jury-waived case against an administratrix, under a general exception to the decision, the defendant may raise for the first time in the supreme court a point that she could not have waived, namely, that the plaintiff had failed to prove that the claim sued on had been rejected and action thereon commenced within two months as required by statute. *Kennedy v. Sniffen*, 115.

18. *Objections to evidence—exceptions.*

An exception to the admission of evidence, to be available in an appellate court, should point out the particular part of the evidence which was objected to. If any of the evidence was admissible, a general objection is not sufficient. *Ter. v. Palai*, 133.

19. *Probate—decree of distribution.*

For the purpose of appeal a decree of distribution is regarded as a final decree. *In re Estate of Clark*, 451.

20. *Reserved questions.*

A question may be reserved by a circuit court of its own motion, notwithstanding a motion for a reservation has been interposed by one of the parties, the court not having ruled on the question. *Territory v. Low*, 108.

21. *Reserved question—question returned unanswered.*

Where the question reserved is whether a demurrer to a bill in equity should be sustained, and the facts are not fully and clearly set out in the bill, the matters are complicated, and the bill is amendable and probably would be amended in case the demurrer were sustained, this court is not required to answer the question, but may, in the exercise of its discretion, return it to the judge who reserved it. *Rumsey v. N. Y. Life Ins. Co.*, 142.

APPEAL AND ERROR—Continued.

22. *Stating reasons for decision.*

A general finding that plaintiff should recover a certain sum of money from defendant and that defendant has failed to make out his alleged defenses of want of consideration and set-off or counter-claim and that plaintiff has established her case as alleged in her complaint by a preponderance of the evidence does not comply with the provisions of section 2380 R. L. which requires the trial court in a jury-waived case to state in its decision the reasons therefor, and the failure to state such reasons is reversible error. *Yoshiura v. Saranaka*, 761.

23. *Verdict—evidence to sustain.*

Where there is more than a scintilla of evidence sustaining it a verdict finding a defendant guilty will not be disturbed. *Territory v. Lam Bo*, 718.

24. *Void judgment.*

The supreme court of this Territory will entertain an appeal to set aside a void judgment of a district court. *Ter. v. Field*, 230.

25. *What constitutes final order.*

What constitutes a final decision or order for the purpose of appeal depends rather upon the nature and effect of the decision than on the stage at which it is rendered. An order determining that a respondent in a suit in equity alleged to be of weak mind and under the undue influence and domination of another may appear, and would be recognized, only through a guardian *ad litem* appointed by the court, the alleged weakness of mind and undue influence being controverted, is a final and appealable order. *Kalaniana'ole v. Liliuokalani*, 457.

26. *Review of interlocutory rulings.*

An appeal from a final order in a suit in equity brings up for review all interlocutory rulings which affected the appellant, but not those which affected only a co-party who has not appealed, and which did not enter into the order appealed from. *Kalaniana'ole v. Liliuokalani*, 457.

27. *Exceptions—point not raised in trial court.*

On exceptions the appellate court will not consider the question of excessive damages when that question was not raised in the trial court by exception or by motion for a new trial based on the ground that the damages awarded are excessive. *Murphy v. Maui Pub. Co.*, 804.

See COSTS, 2; CRIMINAL LAW, 3; EQUITY, 2; EVIDENCE, 2; PLEADING, 1; WATERS AND WATERCOURSES.

"APPOINT."

See WILLS, 2.

APPURTENANCES.

See LANDLORD AND TENANT, 4.

ARBITRATION AND AWARD.

See CONTRACTS, 1.

ARCHITECTS.

1. *Effect of certificate.*

The certificate of an architect that a certain sum is due the contractor, which contains the statement that "it is not to be interpreted as an acceptance of any work or material which is defective, or which is not in accordance with the contract, and in making payment under it the owner reserves the right to hold the contractor strictly responsible for defective work or material, or for any violation of the contract," is no more than *prima facie* evidence that certain work has been done and the contractor is entitled to the compensation specified, and does not constitute an admission binding on the owner, in the absence of proof of fraud or collusion, that the work has been fully completed in accordance with the contract. *Stewart v. Spalding*, 502.

2. *Authority to change terms of contract.*

In an action upon a building contract where it appeared that an owner accepted an offer of a contractor for the erection of a building upon certain terms and a contract embracing those terms was prepared, and thereafter the architect, in the absence of the owner, agreed with the contractor that some of the terms should be changed, an instruction to the jury to the effect that the action of the architect was not binding on the owner in the absence of proof of ratification by him unless the architect had been specially authorized to change the terms of the contract held erroneous, there being no evidence that the architect had been given such authority. *Stewart v. Spalding*, 502.

See CONTRACTS, 2; PRINCIPAL AND SURETY, 4.

ARREST OF JUDGMENT.

See CRIMINAL LAW, 2.

ASSIGNMENT.

See MORTGAGES.

ASSUMPSIT.

1. *Pleading—misjoinder of defendants.*

In an action of assumpsit against several defendants a defendant against whom a cause of action is stated cannot demur on the ground that the declaration shows no cause of action against another defendant. *Mendonca v. Nakamura*, 261.

See PRINCIPAL AND AGENT.

ATTACHMENT.**1. Sufficiency of affidavit.**

An affidavit for attachment which shows the indebtedness of the defendant to the plaintiff "over and above all just credits and offsets" is sufficient without stating that the indebtedness is upon contract, express or implied, a fact to be determined from the complaint in the action. *Nua v. Mahelona*, 702.

2. Undertaking for attachment.

Under section 2783 R. L. an undertaking for attachment in a sum not less than double the amount sued for is required, and where the undertaking for attachment is less than double the amount for which judgment is asked the attachment should be discharged on proper motion made. *Nua v. Mahelona*, 702.

See HUSBAND AND WIFE; REPLEVIN, 1.

ATTORNEY AND CLIENT.**1. Disbarment—reinstatement.**

On an application for reinstatement by a disbarred attorney it must be made to appear that the applicant has accepted and fully acquiesced in the judgment of disbarment, and where, by the applicants own showing, it appears that he has not fully acquiesced in such judgment, his petition for reinstatement will be denied. *In re Mills*, 224.

See LIBEL AND SLANDER, 1, 2; PARTITION, 1; TRUSTS, 1, 2, 8.

ATTORNEY'S FEES.

See DIVORCE, 7; PARTITION, 1; TRUSTS, 1, 2.

AUDITOR.

See MUNICIPAL CORPORATIONS, 1.

AUTOMOBILES.

See MUNICIPAL CORPORATIONS, 5.

BENEFICIAL ASSOCIATIONS.**1. Validity of declaration—change in by-laws.**

A declaration designating the beneficiaries of a death benefit which was valid under the by-laws in force at the time it was made and valid also under those in force when the declarant died, will take effect according to its terms, unaffected by changes which occurred in the interim. *Farias v. Farias*, 412.

2. Death benefits—by-laws construed.

The by-laws of a mutual benefit society provided that upon the death of the wife of a member he should be paid a benefit through an assessment of twenty-five cents levied upon each married member of the society. Upon the death of the wife of a member he was paid such a benefit amounting to \$262.25. Subsequently, by amendments to the by-laws the system was

BENEFICIAL ASSOCIATIONS—Continued.

changed, and it was then provided that upon the death of the wife of a member he would be paid a benefit in the fixed sum of \$400; it was provided also that upon the death of a member his beneficiaries would be paid a benefit in the sum of \$1500 if he "shall not have at any time received a death benefit by reason of the death of his wife," and that if he "shall have at some time received a benefit upon the death of his wife" the sum payable to his beneficiaries would be \$1100. Held, that upon the death of the member who had received the benefit of \$262.25, upon the death of his wife, his beneficiaries were entitled to demand from the society only the sum of \$1100. *Farias v. Farias*, 412.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILL OF REVIEW.

See EQUITY, 2.

BILLS AND NOTES.

1. *Statute of limitations—motion for nonsuit.*

In an action on a promissory note where evidence is received on behalf of plaintiff tending to prove a payment which would prevent the running of the statute of limitations, such evidence not being objected to on any proper ground, a motion for a nonsuit on the ground that the claim is barred by the statute of limitations, is properly denied although such payment has not been pleaded. *Hee Fat v. Wong Kwai*, 328.

See PARTNERSHIP.

BONDS.

1. *Summary judgment on bond to pay judgment on writ of error.*

Plaintiff in proceedings on writ of error may not on dismissal of the writ have summary judgment on the bond to pay the judgment, but is relegated to an action thereon, in which the sureties may avail themselves of any existing defense. *Dong You v. Wing Hing Co.*, 19.

See ATTACHMENTS, 2; OFFICERS, 1, 2, 3.

BOND ISSUES.

See MUNICIPAL CORPORATIONS, 2.

BOUNDARIES.

1. *Questions of law and of fact.*

What is the boundary between certain lands is a question of law, but the location of that boundary upon the ground is a matter of fact. *McCandless v. Du Roi*, 51.

BOUNDARIES—Continued.**2. Construction of description.**

The general rule that course and distance will yield to known visible and definite objects whether natural or artificial will be applied when the description explicitly states that the object is the boundary. *McCandless v. Du Roi*, 51.

3. Meander lines.

Where a decree of the land court determined the boundary of land to be the bank of an auwai, the bank must be regarded as the true boundary, and not the meander points or lines which describe the sinuosities of the auwai. *McCandless v. Du Roi*, 51.

BREACH.

See OFFICERS, 2.

BRIBERY.**1. Allegation and proof—directed verdict.**

An indictment charging bribery of an officer to influence him to refrain from arresting players in a che fa game alleged that such game was then being carried on; the evidence failed to show that any such game had been carried on; the defendant moved for an instructed verdict in his favor, which motion was denied: Held, that the motion for an instructed verdict should have been granted. *Ter. v. Lau Hoon*, 616.

2. Corrupt intent—completed crime.

The gist of the crime of bribery is the corrupting or the attempt to corrupt an official in the discharge of his duty and is complete when the accused has done all that he can do to consummate the crime, it not being necessary that the officer accepting the bribe do so with a corrupt intent. *Ter. v. Lau Hoon*, 616.

BRIEFS.

See APPEAL AND ERROR, 12.

BUILDING CONTRACTS.

See ARCHITECTS, 1, 2; CONTRACTS, 2, 3, 4; PRINCIPAL AND SURETY, 1, 2, 3, 4.

BURDEN OF EVIDENCE.

See EVIDENCE, 1.

BURDEN OF PROOF.

See CRIMINAL LAW, 5; DEEDS, 4.

BY-LAWS.

See BENEFICIAL ASSOCIATIONS, 1, 2.

CANCELATION OF INSTRUMENTS.**1. *Fraudulent representations.***

Where a parent secured from his children the conveyance to himself of valuable property upon the promise to form a corporation and to transfer the property thus obtained, together with other property owned by him, to the corporation and to prorate the stock in said corporation among those originally owning the property, when he in fact had no intention of fulfilling his promises but used them merely as a pretense to induce his children to execute the deed, equity will come to the relief of the defrauded parties and decree a cancelation of the deed thus obtained. *Notley v. Notley*, 724.

See EQUITY, 3.

CATTLE.

See LARCENY, 1, 2.

CERTIFICATE OF APPEAL.

See APPEAL AND ERROR, 5.

CERTIORARI.**1. *Pleading and practice.***

Where, before a writ of certiorari to review an alleged invalid order made by a circuit judge at chambers was issued, the order complained of had been set aside and substituted by another order entered by the circuit judge of his own motion, and the record sent up does not show that the petitioner had notice of the substitution before he applied for the writ but does show that the second order is open to the same objection as the first, the supreme court will not dismiss the writ or require an amendment to the petition or writ, but will dispose of the matter on its merits. *In re Estate of De Mello*, 720.

CHALLENGES.

See JURY, 3.

CHASTITY.

See SEDUCTION, 1.

CHATTEL MORTGAGES.**1. *Definition.***

A chattel mortgage is a transfer of the title or right to acquire title, to personal property as security for the payment of money, or performance of some other act, upon condition that if the transferrer performs the specified act the title shall revert in him. The right to terminate the transferee's interest is a fundamental characteristic. *Territory v. Tsunekichi*, 813.

2. *Instrument examined and held to be an executory contract and not a mortgage.*

CHATTEL MORTGAGES—Continued.

A planter agreed in writing to sell such sugar cane as he might raise upon his land during two years to a plantation. The plantation advanced money and agreed to make further advances upon the security of the crops and the indenture, also to purchase the cane and pay for the same at a specified price per ton of sugar which it would manufacture from the cane based upon the price for the time being of ninety-six degree polarization sugar in New York City. The plantation was given the right to deduct the amount of advances from the purchase price, and it was agreed that in case of default on the part of the planter the plantation should have the right to cancel the agreement or enter upon the land and take possession of the growing crops, if any, and harvest the same. And it was provided that the agreement should continue in force for the full period notwithstanding the payment by the planter of all indebtedness. Held, that the instrument was not a mortgage, its whole tenor being against the idea of a transfer of the title, or the right to acquire title, to the crops of cane as security for the performance of a condition which, if performed, would divest the transferee's interest therein. *Territory v. Tsunekichi*, 813.

"CHILDREN."

See WILLS, 6; WORDS AND PHRASES, 3.

"CHOICE."

See WILLS, 2.

CLERKS OF COURTS.

See OFFICERS, 1.

CODE.

See STATUTES, 1.

COLLATERAL ATTACK.

See DIVORCE, 4.

COMMISSIONS.

See TRUSTS, 6.

CONDITIONAL SALE.

See SALES, 1, 2.

CONDITION SUBSEQUENT.

See CONTRACTS, 5.

CONFLICT OF LAWS.

See DESCENT AND DISTRIBUTION.

CONFRONTATION BY WITNESSES.

See CONSTITUTIONAL LAW, 3.

CONSTITUTIONAL LAW.

1. *Deductions from wages of laborers.*

Sections 3446, 3447 and 3448, R. L., which make it a misdemeanor for an employer to retain or deduct any part or portion of the wages of a laborer in his employ without the written consent of such laborer; or, to collect any fine, store account, offset or counterclaim out of such wages unless by action in court and judgment therefor first obtained, do not impair the obligation of contracts, do not deprive persons of property without due process of law, do not provide for imprisonment for debt, do not deny the equal protection of the laws, and are not unconstitutional on any of said grounds. *Ter. v. McVeagh*, 176.

2. *Municipal corporations—taxation by special assessment.*

A statute providing that the cost of a highway improvement shall be assessed against the lands benefited by the improvement cannot be said to provide for or constitute a taking of private property for public use without just compensation or without due process of law because it does not expressly provide that the amount of an assessment shall not substantially exceed the special benefit conferred. Much latitude must be left to the legislature in determining the method of assessment, and a statute can be successfully called in question only when it is so devoid of any reasonable basis as to constitute an arbitrary abuse of power. *Von Damm v. Conkling*, 487.

3. *Sixth amendment—confrontation by witnesses in criminal cases.*

The constitutional right of confrontation is satisfied when the advantage of seeing the witness face to face and the opportunity to cross-examine him has once been accorded the accused. *Ter. v. Curran*, 421.

4. *Statutes—right to question constitutionality of a statute.*

A question of the supposed conflict of a statutory provision with the Constitution will not be considered at the instance of one whose rights do not appear to be affected by such provision. *Ter. v. Field*, 230.

5. *Taxation—leases of public lands.*

Section 385, R. L. 1915, providing that the value of general leases of public lands, for the purpose of taxation, shall be taken to be the value of the fee of the land demised, as applied to leases made subsequent to the enactment of the statute, held not to deprive the lessee of property without due process of law, or deny him the equal protection of the laws, in violation of the Fifth or Fourteenth Amendments. *In re Taxes Waiohinu Agr. Co.*, 621.

See INDICTMENT AND INFORMATION, 2.

CONSTRUCTION.

See **BENEFICIAL ASSOCIATIONS**, 2; **BOUNDARIES**, 2; **DEED**, 1, 2; **ESTATES**; **LANDLORD AND TENANT**, 2, 3; **RECORDS**, 1; **STATUTES**; **WILLS**.

CONSTRUCTIVE CONTEMPT.

See **CONTEMPT**.

CONTEMPORANEOUS CONSTRUCTION.

See **STATUTES**, 11.

CONTEMPT.

1. *Order to show cause—sufficiency of form.*

In a case of constructive contempt of court, where a proper showing has been made for the issuance of an order to show cause why the alleged contemnor should not be punished, the order is sufficient in form if it states in a general way the nature of the charge made against the party. *Sakan v. Ashford*, 267.

CONTEST.

See **WILLS**, 5.

CONTINUING CONTRACTS.

See **DAMAGES**, 1; **LIMITATION OF ACTIONS**, 2.

CONTRACTS.

1. *Arbitration—condition precedent to action.*

Where, by the terms of a contract, an obligation to submit a question to arbitration depends upon a condition precedent, as that a disagreement shall have arisen, the party who sets up the agreement as a condition precedent to the maintenance of an action upon the contract must show that a disagreement did occur whereby a question to arbitrate was raised. *Stewart v. Spalding*, 502.

2. *Building contract—departure from terms.*

Where a building contract provides that no alterations shall be made in the work except upon the written order of the architect, and no extra compensation shall be due the contractor for work or material except in accordance with a written agreement or by order of the architect with the approval of the owner, and it is shown that the requirements were not lived up to, but that verbal orders were given, received and acted upon, neither party may set up the provision of the contract to defeat the just claims of the other. *Stewart v. Spalding*, 502.

3. *Same—parol evidence not admissible to vary.*

In an action on a contract for the erection of a building for an agreed price in accordance with certain plans and specifications, the contract containing a provision as to further compen-

CONTRACTS—Continued.

sation for extra work, parol evidence that at the time the contract was entered into a different understanding was had as to the amount of work to be done for the agreed price is not admissible. *Stewart v. Spalding*, 502.

4. *Same—time—waiver—action on express contract.*

Though time be of the essence of a building contract and performance within the time specified is not shown, an action on the express contract may nevertheless be maintained if the requirement as to time was waived by the owner, and the plaintiff may recover by showing that he completed the work in a reasonable time after the date named in the contract. *Stewart v. Spalding*, 502.

5. *Release on conditions subsequent.*

The release of an existing debt upon conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs. The release will be avoided if the conditions are not complied with. *Robinson v. Thurston*, 777.

6. *Illegal contract not to be enforced by court.*

A party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. Courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare. *Robinson v. Thurston*, 777.

7. *Void as against public policy.*

The state has a general interest in the freedom of its people in the exercise of their legal and normal rights and any contract that is subversive of those rights without any benefit to the restrainer is against public policy. *Robinson v. Thurston*, 777.

8. *Same.*

A contract which attempts to restrain another from incurring indebtedness in the sum of one thousand dollars and upwards without limits as to time or place, without benefit to the coveantee, is an unreasonable restraint of trade and void because against public policy. *Robinson v. Thurston*, 777.

See DAMAGES, 1; LIMITATION OF ACTIONS, 2, 5, 6; MUNICIPAL CORPORATIONS, 4; PRINCIPAL AND SURETY, 1.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1.

CORPORATIONS.

See TAXATION, 1, 2, 3; TRUSTS, 4, 5.

CORROBORATIVE TESTIMONY.

See SEDUCTION, 2, 3.

CORRUPT INTENT.

See BRIBERY, 2.

COSTS.

1. *Where government officer a party.*

Where one of two parties against whom a final decree is entered is a public officer and, therefore, not liable for costs, and the other party is a contractor who was acting for his own profit, and who defended against the suit on the same general grounds as the officer, but under his own pleadings, through his own counsel and in his own right, held that all recoverable costs should be taxed against the latter. *Magoon v. Lord Young Co.*, 187.

2. *In equity cases—on appeal.*

The rule that costs in suits in equity are in the discretion of the court applies only to costs in the trial court. The costs on appeal of such cases go to the party who prevails in the supreme court under R. L. 1915, 2548. *Magoon v. Lord Young Co.*, 187.

See COUNTIES, 1; CRIMINAL LAW, 6; TRUSTS, 6.

3. *Taxable disbursements.*

Held, that the cost of photographs of the *locus in quo*; of a transcript of the testimony; of typing the record on appeal; and the amount of the premium on an injunction bond, were taxable as reasonable disbursements in this case. The cost of a duplicate transcript held not taxable as a disbursement or allowable as a counterclaim. *Magoon v. Lord-Young Co.*, 187.

4. *Expert witness fees.*

Compensation paid by a party to an expert witness is not recoverable as a taxable disbursement. *Magoon v. Lord-Young Co.*, 187.

COTENANCY.

See PARTITION, 2.

COUNTIES.

1. *Costs.*

In an action against the county for personal injuries received by reason of a defective condition of a public highway the plaintiff cannot recover from the county expenses incurred in procuring evidence as section 2543 R. L. exempts counties from payment of costs. *Reinhardt v. County of Maui*, 524.

2. *Liability for torts—defective highway.*

A county in Hawaii is liable in damages for nonfeasance in failing to repair a defect in a public highway or to guard against injury therefrom resulting in personal injury to one lawfully traveling on the highway. *Reinhardt v. Maui*, 102.

COUNTIES—Continued.

3. *Ordinances—appointment of officers.*

An ordinance of the county of Maui providing for the appointment of a county engineer and defining his duties held not to conflict with the provision of statute (R. L. 1915, Sec. 1509) that the executive officer of the board of supervisors "shall exercise and have general supervision and control over all county affairs, and shall manage the same subject to the advice and direction of said board," nor to have been nullified or repealed by the provision of Act 217 of the Session Laws of 1915, that the executive officer shall "have the power and right to take charge of all county road work and other public construction work of the county," it not appearing that such power had been exercised. *Territory v. Howell*, 797.

COURTS.

1. *Jurisdiction—probate order..*

A circuit judge sitting in probate has no jurisdiction over trusts as distinguished from estates. But an order of surcharge made by a circuit judge in a proceeding in probate upon the settlement of the final account of an executrix, who was also a trustee of certain property devised to her by the will, is not void for lack of jurisdiction on the part of the judge sitting in probate because in arriving at the balance with which the executrix was surcharged the judge erroneously took into consideration certain receipts and disbursements made in the capacity of trustee, and as agent for other trustees. *Colburn v. Whitney*, 32.

2. *Jurisdiction—probate order.*

A circuit judge sitting at chambers in a proceeding in probate has no authority to make an order directing a trustee to render an accounting or pay money into court. *In re Estate of De Mello*, 720.

COVENANTS.

1. *Breach of covenant for quiet enjoyment—pleading.*

In an action for damages for the breach of a covenant for quiet enjoyment the plaintiff must show that he has been prevented from taking possession of the demised premises or has been evicted therefrom by the lessor himself, or by a person claiming under him, or by one having a superior title. *Scott v. Pilipo*, 349.

See LANDLORD AND TENANT, 1.

COVENANT FOR RENEWAL.

See LANDLORD AND TENANT, 1; SPECIFIC PERFORMANCE, 1, 2.

COVENANT FOR QUIET ENJOYMENT.

See LIMITATION OF ACTIONS, 3.

COUNSEL FEES.

See **ATTORNEY'S FEES; TRUSTS**, 8.

CREDITORS' BILL.

See **EQUITY**, 4.

CRIMINAL LAW.

1. *Accessory after the fact—brother of felon.*

A brother of one convicted of the crime of burglary in the second degree, which is punishable by imprisonment at hard labor for a term of not more than years, is not punishable as an accessory after the fact to that offense under Sec. 3675, R. L. 1915. *Territory v. Low*, 108.

2. *Arrest of judgment—errors available.*

On a motion in arrest of judgment errors appearing on the record are available; but an objection that the verdict was contrary to the evidence may not be urged in arrest of judgment. *Ter. v. Anderson*, 347.

3. *Evidence—testimony of absent witness.*

The absence from the jurisdiction of a witness for the prosecution, though only temporary, is a ground for the admission of his testimony given at a former trial of the case when the defendant has opposed a postponement of the case and insisted upon an immediate trial. *Ter. v. Ourran*, 421.

4. *Explosives—injury to property.*

In a prosecution under section 4028 R. L. 1915, charging the unlawful use of dynamite with intent to injure or destroy property, it is not necessary to allege or prove that the property was actually injured. *Ter. v. Palai*, 133.

5. *Evidence—specific intent.*

The burden is on the prosecution to prove that an act charged to have been done with a specific intent was done with that intent. But it is sufficient in such cases to prove facts from which such intent may be inferred. *Ter. v. Palai*, 133.

6. *Jurisdiction—costs—excessive sentence.*

A judgment of a district court sentencing a defendant to imprisonment for one year and to pay costs in a certain sum upon a charge of larceny in the second degree is in excess of jurisdiction as to such costs. *In re Silva*, 766.

7. *Motion to change plea after verdict—discretion of court.*

It is not an abuse of discretion for the trial court after a plea of guilty and sentence in a misdemeanor case to refuse defendant's motion to change his plea from that of guilty to that of not guilty where there is no showing that the defendant was misled by anything said or done by the court or prosecuting attorney although the defendant was sentenced to pay a larger fine than he believed from statements made by a police officer would be imposed upon him. *Ter. v. Snyder*, 636.

CRIMINAL LAW—Continued.

8. *Necessary evidence.*

Every material allegation in an indictment or information or charge against a defendant in a criminal case must be proven as alleged. *Ter. v. Ferguson*, 714.

9. *Principal—accessory before the fact.*

Under Sec. 3674 R. L., and Sec. 3807B, added to the Revised Laws by Act 215 S. L. 1915, one who aids in the commission of an offense or is an accessory before the fact may be charged and punished as a principal and in the same manner and to the same effect. *Ter. v. Peterson*, 476.

10. *Usury.*

The offense prohibited by Sec. 3444 R. L. is committed by receiving interest in excess of the rate of two per cent. per month, and not by entering into a contract whereby the defendant is to receive interest at a rate greater than two per cent per month. *Ter. v. Peterson*, 476.

11. *Usury—securities for loan.*

When money is loaned at a rate of interest greater than two per cent. per month the offense punishable under Sec. 3444 R. L. is not committed merely by taking securities for the loan; the acceptance of security for the loan is not the receiving of interest, discount or consideration upon the loan within the meaning of the statute. *Ter. v. Peterson*, 476.

12. *Warrant of arrest—jurisdiction of person.*

A warrant of arrest in a criminal case is the writ or process by the service of which upon the accused the court acquires jurisdiction of his person. But the issuance of a warrant, or the service of a valid warrant, may be waived and jurisdiction of the person conferred by a general appearance and plea to the charge. *In re Steven*, 250.

See JURY, 2, 3; LOTTERIES; PARENT AND CHILD, 1.

CRIMINAL PROCEDURE.

See APPEAL AND ERROR, 6, 7.

CROSS EXAMINATION.

See TRIAL, 1.

DAMAGES.

1. *Continuing contract—period of limitation.*

In an action for damages for failure of performance or of the consideration under a continuing contract, upon its disaffirmance, the recovery is limited to such injury as occurred within the period of limitation. *Scott v. Pilipo*, 739.

2. *Pain and suffering endured pendente lite—evidence.*

Where the plaintiff sues upon only one cause of action to recover damages for a personal injury received by reason of the defendant's negligence he may recover for pain and suffering en-

DAMAGES—Continued.

dured by him after the action was commenced if the evidence shows that such pain and suffering were caused by the defendant's alleged negligence. *Reinhardt v. County of Maui*, 524.

3. Medical services—evidence.

In an action to recover damages sustained by reason of the defendant's negligence the plaintiff to recover for expenses incurred for medical services must show that such services were necessary and the charges therefor reasonable. *Reinhardt v. County of Maui*, 524.

4. Workmen's Compensation Act—negligence of third party.

Where an employee is injured by reason of the negligence of a third party he may under the Workmen's Compensation Act bring an action against such third party to recover damages caused by such negligence. *Reinhardt v. County of Maui*, 524.

See APPEAL AND ERROR, 27; COUNTIES, 1; COVENANTS.

DEATH BENEFITS.

See BENEFICIAL ASSOCIATIONS, 1, 2.

DECISION.

See APPEAL AND ERROR, 22.

DECREE.

See APPEAL AND ERROR, 1, 3, 19; DIVORCE, 5, 6; SPECIFIC PERFORMANCE, 2.

DEEDS.

1. Construction.

A deed to P and M, habendum to P and M and "their representatives, heirs and assigns forever," conveys to each of said grantees a fee simple in an undivided half of the land. *Kaleialii v. Sullivan*, 38.

2. Same—clearly expressed intention of parties given effect.

Where the granting clause and habendum in a deed decisively show the intention of the parties ambiguities and inconsistencies in other and subsequent clauses of the deed will not defeat such intention. *Kaleialii v. Sullivan*, 38.

3. Conveyance of land under lease—severance of rent from reversion.

A deed conveying land, which is under lease, to certain grantees but containing a clause providing that the rents shall go to the children of the grantor, held not to create a trust, but a conveyance of the fee to the grantees and a grant of the rents accruing under the lease to the grantor's children. A corresponding construction placed upon another deed executed at the same time conveying other land under lease to the same grantees for life, remainder to their children and the children of the grantor, and providing for the division of the revenues between the life

DEEDS—Continued.

tenants and the grantor's children. *Keletheana v. Keahipaka*, 169.

4. Undue influence—burden of proof.

Where the grantors are of mature age and sound mentality the mere fact that they are the children of the grantee does not raise a *prima facie* presumption of the invalidity of the deed from the children to their father thereby casting the burden of showing the fairness of the transaction upon him. *Notley v. Notley*, 724.

See **MECHANICS' LIENS**, 2.

DEFAULT.

See **JUDGMENTS**, 1.

DEFEASANCE.

See **WILLS**, 11.

DEFINITIONS.

See **WORDS AND PHRASES**.

DEMAND.

See **DISMISSAL AND NONSUIT**; **MECHANICS' LIENS**, 1; **SALES**, 2.

DEMURRER.

See **EQUITY**, 7, 8; **LIMITATION OF ACTIONS**, 6; **PLEADING**, 3, 4.

DEPRECIATION.

See **TAXATION**, 1.

DESCENT AND DISTRIBUTION.

1. Conflict of laws—succession of interest in personal property.
The right to an annuity payable out of the income of a fund held in trust, being personal property, is distributable, upon the death of the annuitant intestate, according to the laws of the country where the decedent was domiciled at the time of his death. *Hawaiian Trust Co. v. McMullan*, 685.

DESERTION.

See **DIVORCE**, 3.

DEVISES.

See **ESTATES**; **WILLS**.

DIRECTED VERDICT.

See **APPEAL AND ERROR**, 14, 15; **BRIBERY**, 1; **LIMITATION OF ACTIONS**, 4; **WILLS**, 5.

DISBARMENT.

See **ATTORNEY AND CLIENT**.

DISCOVERY.

See EQUITY, 4.

DISCRETION.

See APPEAL AND ERROR, 20, 21; CRIMINAL LAW, 7; JUDGMENTS, 1.

DISMISSAL AND NONSUIT.

1. *Mechanics' liens—demand.*

Where in an action to enforce a lien under chapter 162 R. L. for materials furnished and used in the construction of a building it is not shown that demand for the amount claimed under the lien was made upon the owner prior to commencing the action, a motion for judgment of nonsuit on that ground should be sustained and the action dismissed as to the defendant owner. *Lewers & Cooke v. Fernandez*, 744.

2. *Motion for—effect of on evidence.*

A motion for a judgment of nonsuit admits everything the evidence fairly tends to prove. *Ferry v. Carlsmith*, 589.

See APPEAL AND ERROR, 10.

DISQUALIFICATION.

See JUDGES.

DISTRIBUTION PER CAPITA.

See WILLS, 7.

DISTRICT COURTS.

See CRIMINAL LAW, 6; EMBEZZLEMENT; PARENT AND CHILD, 1.

DIVIDENDS.

See TRUSTS, 4, 5.

DIVORCE.

1. *Alimony.*

The subsequent misconduct of a wife can be considered upon an application to modify an allowance of alimony, but where the facts disclose a single lapse from virtue, in the absence of other facts and circumstances showing a disposition to err on the part of the wife, such showing is insufficient to warrant the court in disallowing her all future alimony to which she would otherwise be entitled. *Hart v. Hart*, 639.

2. *Failure to provide.*

A wife is not entitled to a divorce on the ground of failure to provide if she deserts her husband or lives apart from him without reasonable cause. *Costa v. Costa*, 381.

3. *Desertion—offer to return.*

In order to bar a suit for divorce on the ground of desertion an offer by the deserting spouse to return must be made before

DIVORCE—Continued.

the period of desertion is complete and the other party has acquired a right to a divorce. *Costa v. Costa*, 381.

4. *Judgment—collateral attack.*

A decree of divorce rendered by a court having jurisdiction of the subject matter and of the parties cannot be collaterally attacked for errors or irregularities; that libellee is not notified of the time of the second trial, the original decree having been vacated, is not such a jurisdictional defect as will render the second decree void. *In re Estate of Clark*, 451.

5. *Same—effect of vacating.*

Where a decree in a suit for divorce is vacated because thirty days had not elapsed after the completion of service of summons on the libellee, it is proper for the court to treat the suit as still pending and retry the same, after the expiration of the thirty days limited by statute, upon the evidence then adduced. *In re Estate of Clark*, 451.

6. *Modification of decree.*

Although in this Territory there is no express authority therefor a circuit judge has undoubted authority to alter or modify the decree respecting the award of alimony upon a proper showing. *Hart v. Hart*, 639.

7. *Allowance for expenses and attorney's fees.*

The provisions of section 2935 R. L. are broad enough to include the allowance of expenses and attorney's fees incurred or to be incurred by a wife in resisting an application for an order revoking an allowance of alimony. *Hart v. Hart*, 639.

8. *Residence—domicil.*

In statutes relating to divorce the term "residence" is used in the sense of and as the equivalent of "domicil." *Zumwalt v. Zumwalt*, 376.

9. *Separate domicil of wife.*

The domicil of a married woman is that of her husband, and she may not acquire a separate domicil by living part from her husband where it is not shown that he had given her cause for divorce prior to the separation. *Zumwalt v. Zumwalt*, 376.

10. *Statutory requirement as to residence—jurisdiction.*

The provisions of section 55 of the Organic Act and section 2927 of the Revised Laws, 1915, that the applicant for a divorce shall have resided in this Territory for two years next preceding the application, are mandatory and jurisdictional, and a circuit judge is without authority to grant a divorce in the absence of proof of domicil for the necessary length of time. *Zumwalt v. Zumwalt*, 376.

See APPEAL AND ERROR, 1; PARENT AND CHILD, 1.

DOMICIL.

See DIVORCE, 8, 9.

DOUBLE TAXATION.

See TAXATION, 3.

DYNAMITE.

See CRIMINAL LAW, 4.

EIJUSDEM GENERIS.

See STATUTES, 10.

EJECTMENT.

1. *Estoppel.*

In ejectment by the second assignee of a lease the plaintiff is estopped by the oral promise of his assignor to the lessor, in consideration of the latter's necessary consent to the assignment, to take only a part of the leased premises, where, pursuant to such promise the consent was given and the part relinquished leased to the defendant. *Peck v. Steere*, 550.

2. *Variance—failure of proof.*

In an ejectment case where the plaintiff sought to recover 1 1-2 acres of land, and proves title to but one acre, and the proofs further show that the plaintiff is in possession of an acre and the defendant is in possession of an undefined parcel not exceeding a quarter of an acre in area, a nonsuit is properly granted for variance between allegation and proof, and failure of proof. *Leialoha v. Mahiai*, 711.

3. *Pleading and proof—description of land in dispute.*

A declaration in ejectment should describe the land sought to be recovered with sufficient certainty that the land can be identified with the description given, and the proofs should show that the land of which the defendant is in possession is the land described in the declaration. *Leialoha v. Mahiai*, 711.

EMBEZZLEMENT.

1. *District courts—jurisdiction.*

The offense of embezzlement where the value of the property involved amounts to \$20 but is less than \$100 is not an infamous offense. A district court has jurisdiction to hear and determine a charge of such offense subject to appeal to the circuit court in the absence of a demand for a jury trial in the first instance. *Ter. v. Overbay*, 91.

EMPLOYER AND EMPLOYEE.

See CONSTITUTIONAL LAW, 1.

ENTERPRISE FOR PROFIT.

See TAXATION, 1, 4.

EQUITY.

1. *Application of maxims*—"he who comes into equity must come with clean hands."

The equitable maxim that "he who comes into equity must come with clean hands" has no application in a case where the relief sought is entirely proper and legal and in no way dependent upon the complainant's previous wrongful (criminal) act. *Kuwahara v. Kuwahara*, 273.

2. *Bill of review—time for filing bill.*

A bill of review based upon errors apparent on the record must ordinarily be brought within the time limited by statute for prosecuting an appeal or writ of error from the decree sought to be reviewed, except in case of the complainant's disability. *Colburn v. Whitney*, 32.

3. *Cancellation of instrument.*

In a suit in equity to obtain judgment canceling a deed it was alleged that the consideration moving to the plaintiff was defendant's promise to "sufficiently and comfortably support her during her natural life," and that defendant had failed and refused so to do; the evidence showed that defendant and his family had lived on the premises conveyed with the plaintiff for nearly four years after the execution of the deed, during which time defendant had furnished plaintiff with clothing and had furnished the food used; plaintiff occasionally complained that she did not get a sufficient amount of food, but never so complained to the defendant; plaintiff finally left the premises without the knowledge or consent of the defendant, who wrote her asking her to return and testified that he had at all times supported, and has at all times been ready and willing and able to sufficiently and comfortably support, plaintiff in accord with her rank and station in life, pursuant to his promise so to do; held, that the plaintiff's suit is without equity and the judgment in her favor reversed with instructions to dismiss plaintiff's bill. *Wailuu v. Kainoa-kupuna*, 531.

4. *Fraud—creditor's bill—discovery.*

A court of equity will not entertain a creditor's bill which seeks relief from a fraudulent conveyance, made or contemplated, and a discovery of assets of the debtor in the hands of others, in advance of the maturity of the creditor's demand, especially where the creditor has no lien on the property conveyed or about to be conveyed. The maturity of the creditor's claim in such case is a condition precedent to the granting of such relief. *Hon. B. and M. Co. v. Bartlett*, 192.

5. *Reference—master's report—estoppel.*

Certain matters in an equity suit were referred to a master with instructions to proceed as speedily as possible and report within sixty days or show excuse for not so doing; the master

EQUITY—Continued.

held hearings after the sixty days had expired and made reports which were confirmed without objection on the ground that they were not filed within time; from a supplemental decree allowing claims for fees and expenses the decree appealed from was attacked on the ground that the master having failed to file his report within the required time the report and the decree confirming it were without jurisdiction and void: Held, that the question of time was not jurisdictional and the parties having acquiesced in the work of the master after the expiration of the sixty days and received the benefits of his labors are estopped from attacking his report on the ground that it was not filed within time. *Scott v. Pilipo*, 625.

6. *Pleading—interest of complainant in subject matter.*

A bill in equity is demurrable which does not show that the complainant has an interest in the subject matter of the suit. The next of kin of a living person has no estate or interest at law or in equity in the property of that person. *Nemo est haeres viventis*. *Kalaniana'ole v. Liliuokalani*, 457.

7. *Pleading—demurrer.*

A bill in equity to restrain the defendant from selling or otherwise disposing of his property unless he satisfies or secures the payment of an unsecured promissory note given by him, which note has not matured, wherein it is alleged that the defendant is absent from the Territory, a fugitive from justice, does not intend to return to the Territory, and is selling and disposing of his property in the Territory to evade payment of such note and to defraud the payee and other creditors, does not state facts sufficient to entitle the plaintiff to the relief sought, and a demurrer on that ground should be sustained. *Hon. B. and M. Co. v. Bartlett*, 192.

8. *Pleading—misjoinder of parties—multifariousness.*

A bill in equity is not demurrable for misjoinder of parties respondent or multifariousness where the complainant claims but one general right, and there is a single subject-matter in which both respondents are interested, though the interests are distinct and different species of relief is asked against each of them. *Rumsey v. N. Y. Life Ins. Co.*, 142.

See APPEAL AND ERROR, 3; COSTS, 2; MECHANICS' LIENS, 2; PROHIBITION; SPECIFIC PERFORMANCE, 2.

EQUITY PROCEDURE.

See APPEAL AND ERROR, 10.

ESTATES.

1. *Estate in fee tail—construction.*

A testatrix devised land to K and K, her husband, 'unto them and to the heirs of the body of either' and "upon default of issue" to trustees appointed by the will. Held, that the testatrix

ESTATES—Continued.

intended to devise to K and K an estate in fee tail, and that, as estates tail cannot exist in Hawaii, the devise took effect as an estate in fee simple in K and K, it not appearing that a life estate in K and K with remainder to the heirs of the body of either would more nearly carry out the intention of the testatrix. *Kinney v. Oahu Sugar Co.*, 747.

See TRUSTS, 4

ESTOPPEL.

1. *Landlord and tenant—parol agreement.*

W desired to procure the assignment of a lease; the written consent of the lessors was necessary to the assignment; W agreed with the lessors in advance that if they would consent to the assignment he would take the leased premises less a certain portion; the lessors consented in writing and the lease was assigned to W; the boundaries were changed so as to exclude the portion agreed to be relinquished, and lessors leased such portion to the defendant; W assigned, with the written consent of the lessors, the lease assigned to him by B, to the plaintiff; the defendant, prior to commencement of action in ejectment by plaintiff, had fenced the portion which W agreed to relinquish. Held: W's promise estopped him from claiming the land in controversy, and that plaintiff is in no better position than was his assignor. *Peck v. Steere*, 550.

ESTOPPEL.

See EJECTMENT, 1; EQUITY, 5; EVIDENCE, 6.

EVIDENCE.

1. *Burden of.*

Where plaintiff has made out a *prima facie* case the burden of evidence shifts to defendant and a nonsuit should not be granted. *Ferry v. Carlsmith*, 589.

2. *Document not offered—appeal and error.*

It is prejudicial error to consider as evidence of a material fact an entry in a book shown by defendant to a witness for plaintiff on cross-examination, the authenticity of which is disputed, where such book was not identified and introduced in evidence. *Halama v. Halama*, 254.

3. *Failure to produce—inference.*

Where material evidence is equally available to both parties, a failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances. *Ter. v. Meyer*, 121.

4. *Prosecution for receiving usury.*

In a prosecution for receiving interest at a rate greater than two

EVIDENCE—Continued.

per cent. per month, where a note, bill of sale and an order were given to secure the loan, it is proper to admit in evidence such written instruments, and other pertinent evidence, for the purpose of showing the transaction between the parties. *Ter. v. Peterson*, 476.

5. *Same—application of payment.*

It is proper to admit evidence of payments to the defendant and the application of such payments when the defendant is tried upon the charge of receiving interest at a rate greater than two per cent. per month. *Ter. v. Peterson*, 476.

6. *Proving matter in estoppel by parol evidence.*

Parol evidence is admissible to establish acts and declarations made by a party under such circumstances as will in equity estop him from denying such acts and declarations. *Peck v. Steere*, 550.

7. *Publication of libel.*

The publication of a libelous article in defendant's newspaper is sufficiently shown by production of a copy of the newspaper containing the libelous article and by evidence that the morning following the issue of such newspaper, a third party called plaintiff's attention to the article and that ten or twelve persons later spoke to him about it where an inspection of the article shows that no one could tell that it referred to the plaintiff without reading the body of the article. *Murphy v. Maui Pub. Co.*, 804.

See APPEAL AND ERROR, 18, 23; CONTRACTS, 3; CRIMINAL LAW, 5, 8; DAMAGES, 2, 3; LARCENY, 1, 2; NEW TRIAL; SEDUCTION, 3; TRIAL, 1, 4; TRUSTS, 7; WILLS, 10.

EXCEPTIONS.

1. *New trial—remitting portion of judgment.*

Where on exceptions to this court it appears from the record that the trial court improperly admitted evidence of items of expense incurred in certain particulars which probably were included in the judgment, no other error appearing, the appellate court will overrule the exceptions upon the condition that plaintiff within a given time remit that portion of the damages apparently recovered by reason of such erroneous evidence, and order that upon plaintiff's failure to remit such items of damage a new trial be granted the defendant. *Reinhardt v. County of Maui*, 524.

See APPEAL AND ERROR, 4, 11, 16, 18, 27.

EXCESSIVE SENTENCE.

See CRIMINAL LAW, 6.

EXCISE TAX.

See TAXATION, 2.

EXECUTION.

See LANDLORD AND TENANT, 7.

EXECUTIVE CONSTRUCTION.

See STATUTES, 11.

EXECUTORS AND ADMINISTRATORS.

L, on the 26th day of July, 1913, devised and bequeathed specific real and personal property to B, and appointed her sole executrix "as respects this property only." In August, 1913, he made another testamentary paper "ratifying and confirming" all that was done by the prior instrument, in which he devised and bequeathed to S all personal, real and mixed property of which he died possessed, either in the Territory of Hawaii or elsewhere, "except as willed and bequeathed as aforesaid," and appointed said S executrix of said "last will and testament, except as aforesaid." Held that the two instruments were properly admitted to probate as the will and codicil of the testator; that the second appointment (or attempted appointment) of an executrix was no revocation of the first, and that S was not entitled to receive the appointment as sole executrix, but that inasmuch as in this Territory two executors of an estate, each having distinct duties with respect thereto are not permissible, it was proper to appoint one person as administrator with the will annexed. *In re Estate of Lutted*, 11.

2. *Probate procedure—more than one executor for same estate.* Under our system of probate procedure, as prescribed by statute, the appointment of different executors in this Territory, each having separate and distinct duties with respect to property of an estate lying in this Territory, is not permissible. *In re Estate of Lutted*, 11.

3. *Appointment of administrator with will annexed.*

Under the facts in this case, held that the appointment of a disinterested person as administrator with the will annexed was proper,—the question of the right of priority in the matter of such administration not being raised or passed upon by the court. *In re Estate of Lutted*, 11.

4. *Statute of non-claim—waiver.*

The statute of non-claim constitutes a special regulation of probate law; it cannot be waived; and need not be specially pleaded. *Kennedy v. Sniffen*, 115.

See APPEAL AND ERROR, 17; COURTS, 1; SPECIFIC PERFORMANCE, 3.

EXEMPTIONS.**1. *Truckman.***

Plaintiff a married woman, owned an auto-truck with which she did the business of a truckman on her own separate account; she did not drive the truck but her husband drove it for her, and by its use she actually earned a living: Held, that plaintiff is a truckman within the meaning of section 2470 R. L., and that the truck is exempt from attachment or execution. *Kaiser v. Pua*, 584.

2. *Claim of exemptions.*

It is not necessary for an attachment or execution defendant to make a claim of exemption as to property specifically exempt from seizure and sale under attachment and other process where the exemption statutes do not provide for the making of such claim but do make the officer seizing the same liable to an action for damages for such seizure. *Kaiser v. Pua*, 584.

See HUSBAND AND WIFE.

EXPERT WITNESS FEES.

See COSTS, 4.

EXPLOSIVES.

See CRIMINAL LAW, 4.

EXTENSION OF TIME.

See APPEAL AND ERROR, 4.

FAILURE OF PROOF.

See EJECTMENT, 2.

FAILURE TO PROVIDE.

See DIVORCE, 2.

FEE TAIL.

See ESTATES.

FINAL DECREE.

See APPEAL AND ERROR, 19.

FINAL ORDERS.

See APPEAL AND ERROR, 11, 25.

"FOOD PRODUCTS."

See STATUTES, 10.

FRANCHISES.

See STREET RAILROADS.

FRAUD.

1. *Elements—intent.*

A promise, accompanied with an intention not to perform it, and made by the promisor for the purpose of deceiving the promisee and inducing him to act where he otherwise would not have done so, constitutes fraud. *Notley v. Notley*, 724.

See EQUITY, 4.

FRAUDULENT CONVEYANCES.

See MECHANICS' LIENS, 2; SALES, 3.

FRAUDULENT REPRESENTATIONS.

See CANCELLATION OF INSTRUMENTS.

GENERAL LEASE.

See PUBLIC LANDS.

GIFTS BY IMPLICATION.

See TRUSTS, 9.

GUARDIAN AD LITEM.

See INSANE PERSONS.

GUARDIAN AND WARD.

See ADOPTION; INSANE PERSONS.

HABEAS CORPUS.

1. *Exceeding jurisdiction—separable judgments.*

In habeas corpus proceedings the return showed that petitioner was committed to serve one year imprisonment and to pay costs in the sum of \$2.50 upon a mittimus issued on a judgment of a district court on the charge of larceny in the second degree: Held, that the judgment as to costs is in excess of the jurisdiction of the court, but the same being separable from the judgment as to imprisonment must be treated as surplusage and the petitioner remanded to serve out the term of imprisonment and to then be discharged. *In re Silva*, 766.

HANDWRITING.

See WITNESSES.

HARMLESS ERROR.

See APPEAL AND ERROR, 13.

"HEIRS OF THE BODY."

See WORDS AND PHRASES, 4.

HIGHWAY IMPROVEMENTS.

See CONSTITUTIONAL LAW, 2; MUNICIPAL CORPORATIONS, 3, 4.

HIGHWAYS.

See COUNTIES, 1, 2.

HUI.

1. *Lease of interest in hui land.*

A lessee of an interest in hui land takes title subject to such valid regulations as have been duly adopted by the hui. *Scott v. Pilipo*, 349.

HUSBAND AND WIFE.

1. *Statutory construction—exemptions.*

Section 2959 R. L. does not amend or repeal any of the provisions in the statutes exempting specific personal property from seizure under attachment or execution, and where the certificate therein provided has not been filed with the treasurer, property of the wife, engaged in business on her own account, which is specifically exempt from seizure under attachment or execution, is not subject to attachment for the debt of her husband. *Kaiser v. Pua*, 584.

HUSBAND AND WIFE.

See APPEAL AND ERROR, 1; DIVORCE.

ILLEGAL CONTRACTS.

See CONTRACTS, 6, 7, 8.

ILLEGALITY.

See PLEADING, 5.

IMPLICATION.

See STATUTES, 7.

IMPLIED CONTRACTS.

See PARENT AND CHILD, 3.

INCOME.

See TRUSTS, 6.

INCOME TAX.

See TAXATION, 3.

INDEBTEDNESS.

See MUNICIPAL CORPORATIONS, 2.

INDICTMENT AND INFORMATION.

1. *Allegation by inference.*

An indictment charging bribery which substantially follows the language of the statute but alleges a material fact by inference is sufficient under our criminal procedure, supplemented by Act 215, S. L. 1915, adopting section 3791E, R. L., under which an allegation that the accused gave a bribe to an officer with intent

INDIOTMENT AND INFORMATION—Continued.

to influence him in the discharge of his duty, alleges by inference that the accused had knowledge of the official character of such officer and is sufficient. *Ter. v. Lau Hoon*, 616.

2. *Verification of information—constitutional law.*

The Fourth Amendment does not require that an information be verified or supported by affidavit except as it is used as the basis for the issuance of a warrant. As a charge or accusation, in the absence of statute, an information may be presented and filed by a public prosecuting officer upon his official oath. *In re Steven*, 250.

INFANTS.

1. *Liability for negligence.*

An infant who has passed out of the realm of mere childish instincts may be held liable for the consequences of his negligence, but not where the negligence consists of a mere breach of contract. *Rathburn v. Kaio*, 541.

See PARENT AND CHILD, 2.

INFERENCES.

See EVIDENCE, 3.

INSANE PERSONS.

1. *Persons under undue influence—appointment of next friend or guardian ad litem.*

A next friend or guardian *ad litem* may be appointed for a person who, though not insane, is alleged to be weak minded and, because of the undue influence and domination of another, is not a free agent. But where an issue is raised by the party's denial of such weak mindedness and undue influence, that issue must be heard and determined *in limine* and before further steps are taken in the suit. *Kalaniana'ole v. Liliuokalani*, 457.

See JURY, 2.

INSTRUCTIONS.

1. *Eliminating questions of fact.*

An instruction in a prosecution for receiving usury, which makes the guilt of the defendant to depend upon the value of a note and securities taken by the defendant to secure the loan, and which eliminates from the consideration of the jury the question of fact as to whether or not the defendant actually received interest at a rate greater than that permissible under the statute, constitutes reversible error. *Ter. v. Peterson*, 476.

See APPEAL AND ERROR, 13, 14; TRIAL, 2, 3, 4, 5.

INSURANCE.

See LIMITATION OF ACTIONS, 6.

INSURANCE COMPANIES.

See **TAXATION**, 2, 3.

INTENT.

See **BRIBERY**, 2; **FRAUD**.

INTERLOCUTORY RULINGS.

See **APPEAL AND ERROR**, 26.

JUDGES.

1. *Disqualification—pecuniary benefit.*

Where a majority of the justices of the supreme court acting under a power of appointment contained in a will, the justices receiving no reward or pecuniary benefit, fill a vacancy among the trustees under such will, they are not thereby disqualified from sitting in a case on appeal involving the validity of the appointment. *In re Estate of Bishop*, 575.

JUDGMENTS.

1. *Default—reasons for opening—discretion.*

The statute, R. L. 1915, Sec. 2363, authorizing the opening of defaults, should be liberally applied by the courts. On appeal the question is whether the trial court abused its discretion. Good and sufficient reasons for opening a default will not be shown to exist unless it be made to appear that the defendant moved with diligence after the default was entered, that he has a meritorious defense, and that he has a reasonable and satisfactory excuse for not having answered. *Takamoto v. Horita*, 370.

2. *Setting aside judgment after default.*

Where a final judgment has been entered in a case after an order of default the application should be to set aside the judgment as well as to open the default. *Takamoto v. Horita*, 370.

3. *Res judicata.*

A fact or question in issue and litigated in a former action between parties is conclusively settled by the judgment therein and they are bound by the adjudication in another action between them though the cause of action or subject matter be different. *Pilipo v. Scott*, 26.

4. *Res adjudicata.*

Where the jurisdiction of a circuit judge sitting in equity in a partition suit to appoint a master in chancery and refer certain matters to him has been adjudged favorably in prohibition proceedings, a decree later rendered confirming the master's report is not subject to attack on the ground that the circuit judge did not have jurisdiction to appoint the master, that question being *res adjudicata* by reason of the decision in the prohibition proceedings. *Scott v. Pilipo*, 625.

JUDGMENTS—Continued.

5. *Same.*

A circuit judge allowed a master in chancery a fee out of a fund in court in a pending suit whereupon plaintiffs petitioned the supreme court for a writ of prohibition against the circuit judge and master prohibiting them from proceeding further with the suit on the ground of disqualification by reason of pecuniary interest; the writ was denied; plaintiffs appealed from the decree thereafter made in the suit assigning as one of the errors the disqualification of the circuit judge and master: Held, that the decision in the prohibition proceedings was conclusive on the question of disqualification of the judge and master, and, *res adjudicata*. *Scott v. Pilipo*, 625.

6. *Res adjudicata—landlord and tenant.*

A judgment for the plaintiff in an action between lessor and lessee to recover rent in which the defense of eviction was unsuccessfully asserted by the defendant is not a bar to a subsequent action by the lessee to recover damages based on failure of performance and of the consideration because of the inability of the lessee to obtain possession of the demised premises. *Scott v. Pilipo*, 739.

JUDGMENTS.

See APPEAL AND ERROR, 24; DIVORCE, 4, 5; EXCEPTIONS; HABEAS CORPUS.

JURISDICTION.

See COURTS, 1, 2; CRIMINAL LAW, 6, 12; DIVORCE, 10; EMBEZZLEMENT; HABEAS CORPUS; LANDLORD AND TENANT, 8; PARENT AND CHILD, 1; PROHIBITION.

JURY.

1. *Qualifications.*

The jury is a body of men foresworn to declare the facts of the case as they are proved from the evidence placed before them, and this means that the jury must declare the facts upon all the evidence and be willing to weigh all the evidence irrespective of its source. *Territory v. Lum Dim*, 792.

2. *Same.*

In a criminal prosecution where the accused through his attorney relies upon the defense of insanity a jury is not impartial when one of its members has expressed on his examination a determination to give no weight to the evidence of the insanity of the defendant at the time of the commission of the crime unless such evidence be that of a physician. *Territory v. Lum Dim*, 792.

3. *Refusal to sustain challenges for proper cause.*

A refusal to sustain challenges for proper cause necessitating peremptory challenges on the part of the accused will be con-

JURY—Continued.

sidered as prejudicial where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury. *Territory v. Lum Dim*, 792.

See NEGLIGENCE, 2; NEW TRIAL.

JURY TRIAL.

See WILLS, 5.

LABOR.

See CONSTITUTIONAL LAW, 1.

LAND COURT.

See APPEAL AND ERROR, 2; BOUNDARIES, 3; RECORDS, 1.

LANDLORD AND TENANT.

1. *Covenant for renewal—exercise of option by lessee.*

A covenant to renew a lease gives the lessee an option which ordinarily he must act upon by giving notice of his intent to renew at or before the end of the term demised. But time is not of the essence of the agreement, unless made so, and the notice being for the benefit of the lessor may be waived by him. *Yip Lan v. Ahulii*, 307.

2. *Lease—construction.*

A lease, like any other contract, is to be construed so as to give effect to the intention of the parties and to every part of the instrument if possible, especially to conditions expressed therein. *Tsunoda v. Young Sun Kow*, 660.

3. *Same—words and phrases.*

No particular form of words is necessary to constitute a lease. Any language which shows the intention of the parties that the lessor will surrender his property and the lessee will take it for a specified term and upon stated conditions is sufficient. *Tsunoda v. Young Sun Kow*, 660.

4. *Same—appurtenances.*

A lease demised to the defendant four parcels of land on one of which was an artesian well; in the premises of the lease nothing was said about the privileges and appurtenances, while the habendum read "To have and to hold" with all "privileges and appurtenances," followed by a stipulation that the defendant should have the right to use as much of the water from such well as should be necessary for the proper irrigation of the lands demised to him, it being shown that one-third of the water from the well is and for three years last past had been sufficient for the proper irrigation of the lands demised to the defendant and that the surplus (two-thirds) of the water from the well had been used in the necessary irrigation of adjacent lands: Held, that such surplus water was excluded from the operation of the lease to the defendant and did not pass to him

LANDLORD AND TENANT—Continued.

as an incident necessary to the use of the lands demised. *Tsunoda v. Young Sun Kow*, 660.

5. *Lease—action for rent.*

The fact that a tenancy under a lease is terminable at the option of the lessor after a certain date does not render the lease void or constitute a defense to an action for rent accruing prior to that date. *Ho Tong v. Hope*, 603.

6. *Liability of subtenant to the landlord.*

A subtenant is not liable upon a covenant to pay rent contained in the contract of lease between the landlord and the tenant under whom the subleasing exists; but where the subtenant enters with the assent of the landlord under an agreement, express or implied, to pay rent to the landlord, an action for use and occupation is maintainable by the landlord against the subtenant. *Mendonca v. Nakamura*, 261.

7. *Summary possession—execution.*

Judgment in plaintiff's favor having been entered by a circuit court in an action for summary possession execution thereunder, namely, a writ of possession, may issue at any time thereafter unless stayed as provided by law. *Novite v. Ham Pong*, 65.

8. *Same—jurisdiction.*

In this case held, that a plea to the jurisdiction of the court which purports to, but does not in fact, allege that the title to real estate is involved, was properly overruled. *Novite v. Ham Pong*, 65.

See CONSTITUTIONAL LAW, 5; DEEDS, 3; ESTOPPEL; HUIS; JUDGMENTS, 6; LIMITATION OF ACTIONS, 2; MORTGAGES; PARTITION, 2; PUBLIC LANDS; SPECIFIC PERFORMANCE, 1.

LARCENY.

1. *Opinion evidence—weight of cattle.*

The weight of an animal alleged to have been stolen may be properly shown by a witness who had seen the same and who from his practical experience could testify to the weight. *Ter. v. Meyer*, 121.

2. *Value—competency of witness.*

If a person shows that his business is such that by commercial reports, newspapers or other means of like nature he is familiar with the market prices of an article, and his recollection of such prices is independent of such market reports, newspapers or his books, the same need not be put in evidence, but the witness may testify the result of his examinations as he might the result of inquiries in the market places. *Ter. v. Meyer*, 121.

3. *Unknown owner.*

Section 3924 R. L. was intended to relate only to cases of lar-

LARCENY—Continued.

ceny where the owner of the property is unknown and not to cases where the owner of the stolen property is known. *Territory v. Ferguson*, 714.

4. Ownership.

The ownership of property alleged to have been stolen is a material fact and must be proved as alleged. *Territory v. Ferguson*, 714.

LAST CLEAR CHANCE.

See NEGLIGENCE, 1.

LEASES.

See CONSTITUTIONAL LAW, 5; LANDLORD AND TENANT.

LEGISLATIVE INTENT.

See STATUTES 9, 13.

LIBEL AND SLANDER.**1. Privileged communication.**

An attorney in the conduct of judicial proceedings is privileged from prosecution for libel or slander in respect to words or writings used in the course of such proceedings reflecting injuriously upon others when such words or writings are material and pertinent to the questions involved regardless of the motive prompting the use of the words or writings, but counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions against a party, witness³ or third person which have no relation to the subject-matter of the inquiry. *Ferry v. Carlsmith*, 589.

2. Attorney—misconduct.

An article printed in a newspaper to the effect that an affidavit had been filed in a civil case stating that plaintiff, an attorney, had settled a case without the knowledge or consent of his client imputes malpractice or professional misconduct to the plaintiff and is libelous *per se*. *Murphy v. Maui Pub. Co.*, 804.

3. Presumption of malice.

The law presumes malice from the publication of a libel that is actionable *per se* and it is not necessary to prove actual malice. *Murphy v. Maui Pub. Co.*, 804.

4. Privileged communication.

The privilege extended to a litigant to charge in a judicial proceeding libelous matter pertinent to the issues therein does not extend to third parties or the press. The republication of libelous matter contained in the pleadings or other papers in civil actions prior to hearing is an adoption and indorsement of such libelous matter by the one republishing it and such republication is not privileged. *Murphy v. Maui Pub. Co.*, 804.

See EVIDENCE, 7.

LIENS.

See MECHANICS' LIENS, 2.

LIMITATION OF ACTIONS.

1. *Acknowledgment of debt—promise to pay.*

A clear, definite and unqualified acknowledgment made by the maker of a promissory note, after the statute of limitations has run against it, that the note is a valid and subsisting obligation for which he is liable will give rise to an implied promise to pay it. *Trust Co. v. Low*, 696.

2. *Giving security or substituting collateral.*

The giving of security or the substituting of collateral to secure payment of a note is a sufficient acknowledgment to remove the bar of the statute. *Trust Co. v. Low*, 696.

3. *Acknowledgment made to stranger.*

An acknowledgment made to a mere stranger, where it is not shown that it was made with the intent on the part of the debtor that it should be communicated to the creditor, nor that it was in fact communicated to him and lulled him into inaction, is ineffective to remove the bar. *Trust Co. v. Low*, 696.

4. *Continuing contract—lease.*

The statute of limitations begins to run against a right of action for damages for failure of performance and of the consideration of a continuing contract, not upon the first breach or failure, but from the time when the plaintiff elected to disaffirm the contract. The rule applies to a lease of land where the lessee has been unable to obtain possession. *Scott v. Pilipo*, 739.

5. *Covenant for quiet enjoyment.*

Where, at the commencement of a term, the lessee is unable to obtain possession of the demised premises through the fault of the lessor the covenant for quiet enjoyment is then broken and the statute of limitations begins to run at once. *Scott v. Pilipo*, 349.

6. *Directed verdict.*

The plaintiff's complaint showed *prima facie* that the cause of action sued on was barred by the statute of limitations; a demurrer to the complaint on that ground was overruled; that defendant pleaded the general issue, and, no rule of court requiring him to plead the statute, gave notice in his answer that he would rely on the bar of the statute as a defense; plaintiff at the trial introduced evidence proving his case as alleged but offered no evidence tending to prove any fact taking the case out of the operation of the statute: Held, that the trial court properly directed the jury to find a verdict for the defendant. *Otokichi v. Sekijiro*, 234.

7. *Statute and exceptions—contract stipulation.*

Where parties by contract stipulate that no action shall be commenced upon the contract unless commenced within a certain

LIMITATION OF ACTIONS—Continued.

time, the time being reasonable for the purpose, such stipulation becomes a condition of the contract, is binding on the parties, and neither the statute of limitations nor the exceptions thereto apply. *Silverhorn v. Ins. Co.*, 160.

8. Pleading by demurrer—insurance.

Where it appears upon the face of the complaint in an action upon an insurance policy that the parties stipulated in the policy that the defendant, the insurer, should not be liable in an action thereon unless the same was commenced within one year from the date of the death of the insured, and the insured had been dead more than one year before the action was commenced, a demurrer to the complaint upon the ground that the action was not commenced within the stipulated time is proper and should be sustained. *Silverhorn v. Ins. Co.*, 160.

See **BILLS AND NOTES; DAMAGES, 1; PLEADING, 4.**

"LIMITED."

See **WORDS AND PHRASES, 5.**

LOTTERIES.**1. Slot machine—criminal law.**

Defendant conducted a slot machine whereby each nickel played into it brought to the player a package of gum, and, at irregular and uncertain times, dropped into a cup for the player trade checks redeemable in merchandise at five cents each, and in multiples of two, the maximum number of trade checks which might be received being twenty; the machine is so arranged that each operation shows just what the succeeding one will distribute; by a series of operations the player may or may not receive trade checks exceeding in value the amount of money which he deposits: Held, that the distribution of merchandise other than the gum involves the element of chance and is a lottery within the meaning of Secs. 4169, 4170, R. L. *Ter. v. Beeson*, 445.

MALICE.

See **LIBEL AND SLANDER, 3.**

MALICIOUS PROSECUTION.**1. Essential elements—pleading.**

A complaint which alleges that a criminal proceeding was instituted against the plaintiff by the defendant; that it was done without probable cause and with malice on the part of the defendant; that the proceeding terminated in favor of the plaintiff; and that the plaintiff sustained damage, states a case of malicious prosecution. *Leong Yau v. Carden*, 362.

MALICIOUS PROSECUTION—Continued.

2. Termination of original proceeding—*nolle prosequi*.

A *nolle prosequi*, when not entered at the instance or with the consent of the defendant, is a sufficient termination of the proceeding upon which to found a claim for damages for malicious prosecution. *Leong Yau v. Carden*, 362.

3. Liability of prosecuting officers.

A public prosecuting officer is not to be held liable in damages for an honest mistake or mere error of judgment in instituting criminal proceedings; but if he proceeds maliciously and without probable cause, he will render himself liable in damages to the party injured. *Leong Yau v. Carden*, 362.

MASTER AND SERVANT.

1. Negligence—omission of precautions to prevent accident.

The true question for the jury is not whether the master could have done something to prevent an injury to his servant, but whether he omitted any precaution which a prudent and careful man would or ought to have taken. *Martin v. Wilson*, 74.

MASTER'S REPORT.

See EQUITY, 6.

MAXIMS.

See EQUITY, 1.

MEANDER LINES.

See BOUNDARIES, 3.

MECHANICS' LIENS.

1. Demand—pleading and proof.

In an action to enforce a lien for materials furnished and used in the construction of a building, demand upon the owner for payment of the amount claimed under the lien is, under the provisions of section 2867 R. L., a condition precedent to bringing the suit, and such demand must be alleged and proven. *Lewers & Cooke v. Fernandez*, 744.

2. Fraudulent conveyances.

A voluntary conveyance, by the owner of a lot upon which he has erected a building, to his wife (through an intermediary), made for the purpose of defeating the right of a material man who has furnished materials used in constructing such building, is void, at law and in equity, as against a lien for such materials, proper notice of which was filed within the time required by statute, and it is not necessary to resort to equity to procure the cancellation of such deed in order to enforce the lien for such materials. *Lewers & Cooke v. Jones*, 21.

See DISMISSAL AND NON-SUIT.

MEDICAL SERVICES.

See DAMAGES, 3.

MILITARY RESERVATIONS.

See TAXATION, 6.

MISJOINDER OF PARTIES

See ASSUMPSIT.

See EQUITY, 8

MORTGAGES.

1. *Mortgage of leasehold.*

The assignment of a lease of land by way of mortgage is not a chattel mortgage, but the conveyance of an interest in real estate within the meaning of R. L. Sec. 3118. *Henriques v. Koluokamaile*, 766.

See CHATTEL MORTGAGES, 1, 2; WILLS, 8.

MOTIVE.

See TRIAL, 3.

MULTIFARIOUSNESS.

See EQUITY, 8

MUNICIPAL CORPORATIONS.

1. *Auditor—issuance of warrant.*

In the absence of a showing of fraud, or dispute as to the amount found by the board of supervisors to be due, the auditor of the city and county of Honolulu is without authority to refuse to issue a warrant drawn by him in payment of a claim duly allowed and ordered paid by the board of supervisors. *Teves v. Reade*, 564.

2. *Indebtedness—bonds payable only out of special fund.*

The issuance of bonds payable only out of a specific fund raised by a special tax for a public improvement does not constitute municipal indebtedness within the meaning of fundamental limitations upon such indebtedness. That a contingent future liability on the part of the municipality may exist in connection with such issuance does not alter the rule. *Von Damm v. Conkling*, 487.

3. *Proceedings under improvement statutes—special assessments.*

Where a statute authorizes highway improvements to be made at the cost of property specially benefited upon assessments levied according to area or frontage, one improvement district may include a combination of improvements, and the assessment as to some be made according to area and as to others according to frontage. *Von Damm v. Conkling*, 487.

MUNICIPAL CORPORATIONS—Continued.**4. Public contracts—time limit for execution of contract.**

The provision of R. L. 1915, Sec. 1798, that no bid for a contract for a highway improvement shall be considered unless accompanied by a certified check payable to the city and county, which check shall be forfeited unless the bidder shall sign the contract and furnish an approved bond within ten days after the contract is awarded, held to be a provision for the benefit of the municipality which does not prohibit the signing of the contract and furnishing the bond after the expiration of ten days, or prevent the board of supervisors from reasonably extending the time for so doing. *Von Damm v. Conkling*, 487.

5. Police Power—ordinances—automobiles.

Certain provisions of ordinance No. 31 of the County of Maui, relating to the registration of motor vehicles and the certification of chauffeurs held not to constitute a prohibition of the operation of motor vehicles upon the highways but reasonable regulations made in the exercise of the police power. *Ter. v. Field*, 230.

See CONSTITUTIONAL LAW, 2; GARNISHMENT, 1, 2; STATUTES, 12.

NECESSARIES.

See PARENT AND CHILD, 3.

NEGLIGENCE.**1. Contributory negligence by plaintiff—last clear chance.**

Although plaintiff may have been guilty of negligence that contributed to the injury of which he complains, yet, if the defendant could have avoided the injury by the use of reasonable care, it was his duty to do so, failing which duty a verdict against him is authorized. *Hughes v. McGregor*, 156.

2. Primarily question for jury.

The question of negligence is primarily one for the jury under proper instructions, and becomes a matter of law for the court only where there is no conflict in the evidence and but one inference can reasonably be drawn from the facts. *Martin v. Wilson*, 74.

See APPEAL AND ERROR, 14, 15; DAMAGES, 4; INFANTS; MASTER AND SERVANT.

NET PROFITS.

See TAXATION 1.

NEWSPAPERS.

See EVIDENCE, 7; LIBEL AND SLANDER, 2, 3.

NEW TRIAL.**1. Verdict—sufficiency of evidence.**

A circuit judge should not grant a new trial on the ground merely that a verdict for the defendant was against the weight of the

NEW TRIAL—Continued.

evidence where it cannot be said that there was no substantial evidence to support it. *Martin v. Wilson*, 74.

See APPEAL AND ERROR, 15; EXCEPTIONS.

NEXT FRIEND.

See INSANE PERSONS.

NOLLE PROSEQUI.

See MALICIOUS PROSECUTION, 2.

NONSUIT.

See BILLS AND NOTES.

NOSCITUR A SOCIIS.

See STATUTES, .8.

OBLIGEE.

See OFFICERS, 3.

OFFICERS.

1. *Official bonds—clerks of circuit courts.*

After the repeal of section 60, Chap. 57, S. L. 1892, circuit judges were authorized to require the clerks of their respective courts to give bonds for the faithful performance of their duties under the act of October 4, 1894 (R. L. 1915, Sec. 150) and upon breach of condition thereof the obligation could be enforced by the summary procedure authorized by section 149, R. L. 1915. *Ter. v. Hart*, 558.

2. *Official bonds—breach of condition to perform duty.*

The failure of a public officer to perform a duty resting upon him by virtue of his office constitutes a breach of condition of a bond given for the faithful performance of the duties of his office. *Territory v. Howell*, 797.

3. *Same—obligee—action on bond.*

Where an improper obligee has been named in an official bond an action on the bond may be maintained in the name of the obligee for the use and benefit of the proper party, and the damages will be measured by the interest of that party. *Territory v. Howell*, 797.

OFFICIAL BONDS.

See OFFICERS, 1, 2, 3.

OPENING JUDGMENTS.

See JUDGMENTS, 2.

OPINION EVIDENCE.

See LARCENY, 1, 2.

ORDER TO SHOW CAUSE.

See CONTEMPT.

ORDINANCES.

See COUNTIES, 3; MUNICIPAL CORPORATIONS, 5; STATUTES, 12.

OWNERSHIP.

See LARCENY, 3, 4.

PARENT AND CHILD.

1. *Divorce—criminal law—jurisdiction.*

In a prosecution under section 2970, R. L., for refusing to provide support and maintenance for his minor children, it is no defense on the part of the accused that his wife has been decreed a divorce, alimony, and the custody of their minor children (the decree being silent as to their support). In such case the district court has jurisdiction to convict the defendant, to suspend sentence for one year, and to require him to pay \$2.50 weekly for support of his two minor children and to require him to give bond to secure such weekly payments. *Ter. v. Quini*, 281.

2. *Infants—liability of father for torts of minor child.*

At common law a father was not liable, merely because of the relation, for the torts of his child. And under R. L. 1915, Secs. 2375 and 2993, the father is responsible for the torts of a minor child only in case the child itself could be held liable. *Rathburn v. Kaio*, 541.

3. *Liability of adoptive father for support of abandoned child.*

An adoptive father who has abandoned his child may be held liable upon an implied contract to one who has furnished the child with necessary support, for the value thereof not in excess of what is reasonable considering the child's station in life. *Kennedy v. Sniffen*, 115.

See CANCELLATION OF INSTRUMENTS.

PAROL AGREEMENTS.

See ESTOPPEL.

PARTIES.

See EQUITY, 6; SPECIFIC PERFORMANCE, 3.

PARTITION.

1. *Attorney and client—attorney fees.*

In a partition suit attorney fees should not be allowed certain defendants where the evidence showing that the services of such attorneys tend to the common benefit of all the cotenants is too indefinite and vague to establish the value and beneficial character of such services. *Scott v. Pilipo*, 625.

PARTITION—Continued.**2. *Cotenant—accounting for rents.***

Where a supplemental petition is filed in a partition suit, wherein the parties are numerous, praying that process issue against one who has succeeded to the interest of one of the cotenants and collected rents from others occupying a portion of the lands to be partitioned the prayer of the supplemental petition should be granted and an accounting required in the partition suit, all of the parties thereto being interested in the rents. *Scott v. Pilipo*, 625.

PARTNERSHIP.**1. *Nontrading—power of members to execute notes.***

In order to hold a non-trading partnership upon a note given in the firm name by one partner it must be shown as a question of fact that authority to execute the note existed, or that the act has been ratified (*Lea Bow v. Young Yung*, 11 Haw. 772). *Hee Fat v. Wong Kwai*, 328.

PECUNIARY BENEFIT.

See JUDGES.

PENAL LAWS.

See STATUTES, 3.

PHYSICIANS AND SURGEONS.

See DAMAGES, 3.

PLEADING.**1. *Amendment on appeal.***

An amendment to a pleading will not be allowed in the supreme court on appeal when it would change the issue and cause the reversal of a judgment which was free from error at the time it was entered. *Scott v. Pilipo*, 349.

2. *Defective, aided by absence of demurrer and the introduction of evidence to support.*

A complaint which only inferentially avers a material fact, in the absence of a demurrer and where much evidence is given without objection to sustain the fact improperly pleaded, held, the defect was thereby cured. *Notley v. Notley*, 724.

3. *Demurrer—waiver.*

Where defendant demurs to plaintiff's complaint on the ground that it appears therefrom that the plaintiff's cause of action is barred by contract of the parties and the trial court and the parties treat such demurrer as properly raising the question, the plaintiff, after the demurrer is sustained, should not, on appeal, for the first time, be permitted to question the right of the defendant to raise the question by demurrer but should be

PLEADING—Continued.

held to have waived the question of procedure. *Silverhorn v. Ins. Co.*, 160.

4. Demurrer—statute of limitations.

In an action at law where the complaint shows on its face that the cause of action is barred by the statute of limitations the bar of the statute may be pleaded by demurrer, in which case the demurrer should be sustained. *Otokichi v. Sekijiro*, 234.

5. Rule of court.

A rule of court requiring a defendant to give notice that the defense of illegality will be relied upon does not apply where the illegality appears upon the face of the plaintiff's complaint. *Robinson v. Thurston*, 777.

See ASSUMPSIT; COVENANTS; EQUITY, 6, 7, 8; EXECUTORS AND ADMINISTRATORS, 4; LIMITATION OF ACTIONS, 4, 6; MALICIOUS PROSECUTION, 1.

PLEADING AND PRACTICE.

See CERTIORARI.

PLEADING AND PROOF.

See EJECTMENT, 3; MECHANICS' LIENS, 1; SEDUCTION, 1.

POLICE POWER.

See MUNICIPAL CORPORATIONS, 5; STATUTES, 12.

PRESUMPTIONS.

See DEEDS, 4; LIBEL AND SLANDER, 3.

PRINCIPAL.

See TRUSTS, 6.

PRINCIPAL AND ACCESSORY.

See CRIMINAL LAW, 9.

PRINCIPAL AND AGENT.

1. Assumpsit—liability of agent.

An agent who receives money for his principal under promise to deposit it in bank for the principal and neither deposits the money in bank to the credit of the principal nor pays it to the principal, but delivers it to another who appropriates it to his own use, is liable therefor to the principal in an action of assumpsit. *Nua v. Mahelona*, 702.

PRINCIPAL AND SURETY.

1. Building contracts—changes in plans.

Where a building contract provides that the owner shall have the right to order changes to be made in the work a surety on the bond of the contractor is deemed to have assented in advance to the making of changes, and he will not be released from lia-

PRINCIPAL AND SURETY—Continued.

bility unless the changes made were of such a character as could not reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into. *Hustace v. Davis*, 606.

2. Deviations from terms of contract in method of procedure or performance.

Departure from the terms of a building contract in the method of procedure or performance in the manner of carrying out the contract, as in the matter of making payments, will not release the surety on the bond unless the deviations tended to prejudice his rights. *Hustace v. Davis*, 606.

3. Extension of time for performance.

Where a building contract contemplated an extension of the time for performance for a period equivalent to any delay that might be caused by the owner if written claim for such extension should be presented within forty-eight hours of the occurrence, held that where delay had been caused by orders for changes in the work and the architect allowed a definite extension of time, the surety on the bond was not released from liability by reason of the failure of the contractor to make written application for an extension. *Hustace v. Davis*, 606.

4. Written order for changes.

Where a building contract contemplated the making of changes in the work and provided that the making of changes should not affect the validity of the contract, and provided also that no changes should be made except upon the written order of the architect, held that where certain changes were made pursuant to the requirement of the owner and upon the verbal order of the architect, the surety on the bond was not released by reason of the fact that the architect's order was not made in writing. *Hustace v. Davis*, 606.

PRINCIPAL AND SURETY.

See BONDS.

PRIVILEGED COMMUNICATIONS.

See LIBEL AND SLANDER, 1, 4.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 1.

PROBATE.

See APPEAL AND ERROR, 19; EXECUTORS AND ADMINISTRATORS.

PROBATE ORDER.

See COURTS, 1, 2.

PROHIBITION.

1. *Equity—jurisdiction.*

Where a bill in equity shows that the controversy between the parties is such as a court of equity may properly take cognizance of, prohibition does not lie to restrain the proceeding because the bill shows that the complainants have an adequate remedy at law, or is demurrable on some other ground which does not go to the jurisdiction of equity over the subject matter. *Sakan v. Ashford*, 267.

PROMISE TO PAY.

See **LIMITATION OF ACTIONS**, 1.

PUBLICATION.

See **EVIDENCE**, 7.

PUBLIC CONTRACTS.

See **MUNICIPAL CORPORATIONS**, 4.

PUBLIC LANDS.

1. *General lease.*

A lease of public land for a term of twenty-one years, which is designated upon its face to be a "general lease," and which does not come within the category of any other kind of lease described in R. L. 1915, Chap. 30, relating to public lands, held to be a general lease within the meaning of said chapter notwithstanding it included a provision allowing the lessor to withdraw the land or any portion thereof at any time during the term for homestead, settlement or public purposes. *In re Taxes, Waiohinu Agr. Co.*, 621.

PUBLIC LANDS.

See **CONSTITUTIONAL LAW**, 5.

PUBLIC OFFICERS.

See **COSTS**, 1; **COUNTIES**, 3; **TAXATION**, 5.

PUBLIC POLICY.

See **CONTRACTS**, 7, 8; **GARNISHMENT**, 1.

QUIET ENJOYMENT.

See **LIMITATION OF ACTIONS**, 3.

RECORDS.

1. *Decree of land court—construction—description of land.*

A surveyed description of land contained in a decree of the land court, if it requires construction, is subject to the same rules of construction as a description contained in an instrument *inter partes*. *McCandless v. Du Roi*, 51.

RECORDS—Continued.**2. Lease—subsequent purchaser.**

An unrecorded mortgage of a lease of land is void as against one who, in good faith and without actual notice of the mortgage, takes a lease of the land from the owner, the lessor having in the meantime reentered for breach of condition on the part of the original lessee to pay rent. *Henriques v. Kalokuokamaile*, 706.

RECORDS.

See **ADOPTION**.

REFERENCE.

See **EQUITY**, 5.

RELEASE.

See **CONTRACTS**, 5.

REMAINDERMEN.

See **TRUSTS**, 4; **WILLS**, 8.

REMANDING CAUSE.

See **APPEAL AND ERROR**, 6.

RENT.

See **LANDLORD AND TENANT**, 5; **PARTITION**, 2.

REPEAL.

See **STATUTES**, 5.

REPLEVIN.**1. Attached property.**

It is a good defense to an action of replevin against a sheriff that he holds the property by virtue of a valid writ of attachment against a third party who is the real owner. *Chang Yet Yow v. Rose*, 220.

2. Possession—trespass.

Where one takes forcible possession of his own goods he may be liable in trespass but not in replevin. *Atau v. Goo Wan Hoy*, 182.

RES ADJUDICATA.

See **JUDGMENTS**, 3, 4, 5, 6.

RESERVED QUESTIONS.

See **APPEAL AND ERROR**, 20, 21.

RESIDENCE.

See **DIVORCE**, 8, 10.

RESTRAINT OF TRADE.

See **CONTRACTS**, 8.

RESULTING TRUSTS.

See TRUSTS, 9.

REVIEW.

See APPEAL AND ERROR, 26.

REVISION.

See STATUTES, 1.

RIGHT TO POSSESSION.

See SALES, 2.

ROADS AND STREETS.

See HIGHWAYS.

RULE OF COURT.

See PLEADING, 5.

SALES.

1. *Conditional sale—title—performance.*

In a conditional sale title to the property remains in the vendor until the vendee has paid the purchase price or made proper tender thereof. A mere readiness to pay or to make tender is not sufficient. *Atau v. Goo Wan Hoy*, 182.

2. *Same—right to possession—demand—tender.*

Where, under the terms of an agreement of conditional sale upon deferred payments, a part of the purchase price has been paid, and payments have been received after they were due, and time is not of the essence of the contract, a demand for performance on the part of the vendee is necessary before the property can be retaken by the vendor. If upon demand the vendee fails to pay the sum due and thereupon the vendor retakes the property a subsequent tender will be too late, but in the absence of such a demand the vendee, in order to replevy the goods, need not prove that he had tendered the balance of the purchase price. *Atau v. Goo Wan Hoy*, 182.

3. *Fraudulent conveyances—retention of possession by vendor.*

Under Sec. 3120, R. L. 1915, a sale of personal property is void as to creditors of the vendor where there is no delivery and change of possession of the property, and the evidence of the sale is not recorded. *Chong Yet You v. Rose*, 220.

SEDUCTION.

1. *Chastity—pleading and proof.*

In a prosecution for the offense of seduction under R. L. 1915, Sec. 3902, the chastity of the female need not be alleged, nor need it be proved before it has been attacked, if at all. The unchaste character of the prosecutrix may be shown in defense. Where the burden of proof lies when the question of chastity

SEDUCTION—Continued.

has been made an issue, *quaere*. *Territory v. Capitan*, 771.

2. *Corroboration*.

The provision of R. L. 1915, Sec. 3903, that no person shall be convicted of seduction upon the uncorroborated testimony of the prosecutrix, requires supporting evidence as to the promise of marriage and the carnal connection, but not as to the previous chastity of the prosecutrix, or that she was unmarried. *Territory v. Capitan*, 771.

3. *Same—evidence*.

Whether, in a given case, there was any corroboration of the testimony of the prosecutrix is a question of law, but where there was some such evidence its sufficiency would be for the jury to determine. Held, in this case, that there was some circumstantial corroborating evidence, and that its weight and sufficiency was for the jury. *Territory v. Capitan*, 771.

SENTENCE.

See CRIMINAL LAW, 6.

SEPARABLE JUDGMENTS.

See HABEAS CORPUS.

SLOT MACHINE.

See LOTTERIES.

SPECIAL ASSESSMENTS.

See CONSTITUTIONAL LAW, 2; MUNICIPAL CORPORATIONS, 3.

SPECIFIC INTENT.

See CRIMINAL LAW, 5.

SPECIFIC PERFORMANCE.

1. *Covenant to renew lease*.

Equity will decree the specific performance of a covenant to renew a lease where the lessee, within a reasonable time after the expiration of the lease in exercise of the option pays, and the lessor accepts and retains, the rent for the first period upon a new term. *Yip Lan v. Ahulii*, 307.

2. *Parties—decree*.

Persons who, after the making of a contract to convey or lease land, acquire an interest in the land from the vendor or lessor are necessary parties to a bill for the specific performance of the contract. In the absence of a necessary party, the appellate court, if it cannot make a decree which will finally dispose of the controversy, may remand the cause for the purpose of bringing a new term. *Yip Lan v. Ahulii*, 307.

3. *Suit against executor—parties*.

SPECIFIC PERFORMANCE—Continued.

Under Chap. 159, R. L., where a testator, during his lifetime, sold to plaintiff certain real estate and received the full purchase price thereof and executed a written agreement wherein he promised to make, execute and deliver to the plaintiff a deed for such real estate, but died before doing so, a suit may be maintained for specific performance of such written contract against the executor of testator's estate without joining the heirs or devisees of the testator. *Looney v. Trent Trust Co.*, 208.

STATEMENT OF CASE.

See APPEAL AND ERROR, 12.

STATUTES.**1. Code or revision—construction.**

In case of ambiguity or repugnancy in a code or revision of laws the original legislation may be referred to as an aid to correct interpretation. Statutes carried into a revision retain their original effect unless an intent to make a change is clear, and in case of a repugnancy the later original enactment will prevail over the earlier. *Ter. v. Overbay*, 91.

2. Sec. 3937 R. L. 1915 construed.

The words 'at hard labor' in lines 7 and 8, Sec. 3937 R. L. 1915, held to be inoperative in view of the provisions of sections 1461, 1771 and 1772. *Ter v. Overbay*, 91.

3. Construction.

If a literal interpretation of the language used in a statute would lead to palpable injustice the courts will search for a more reasonable meaning of the language which will also accord with the spirit of the enactment. *Rathburn v. Kaio*, 541.

4. Statute in derogation of the common law.

A statute in derogation of the common law is to be construed strictly, and the common law will be held not to have been further abrogated than the language of the act clearly requires. *Rathburn v. Kaio*, 514.

5. Construction—repeal of special provision.

Where a statute prescribes a special rule applicable to a certain class and there is another statute which prescribes a general rule applicable to all but the excepted class the repeal of the special statute will render the general statute applicable to the class formerly excepted. *Ter v. Hart*, 558.

6. Application of new remedy for enforcement of pre-existing right.

A statute relating to procedure and giving a new and additional remedy may be applied to the enforcement of the obligation of a contract which was entered into prior to the enactment of the statute. *Ter. v. Hart*, 558.

STATUTES—Continued.

7. *Construction—reason and spirit—implication.*

In case of incompleteness or ambiguity of expression the reason and spirit of the statute should be considered. That which is necessarily or plainly implied in a statute is as much a part of it as that which is expressed. *Chang Yet You v. Rose*, 220.

8. *Construction—noscitur a sociis.*

The rule *noscitur a sociis* does not apply in the construction of a statute where specific words are used which are not relatives of the same genus. There neither word derives color from association with the others, but each stands as the representative of a distinct class. *Ter. v. Hon. R. T. & L. Co.*, 387.

9. *Legislative intent—conditions and circumstances existing at time of enactment.*

In ascertaining the meaning of a statute which requires construction the court should consider the language used in connection with the conditions and circumstances existing at the time of its enactment. *Ter. v. Hon. R. T. & L. Co.*, 387.

10. *Sec. 2032 R. L. 1915—construction—ejusdem generis.*

The rule of *ejusdem generis* is applicable in the construction of Section 2032, R. L. 1915, and held, that the words "other food products" are limited to food products of like kind with those expressly mentioned in the statute, and do not include manufactured raw sugar. *Ter. v. Hamakua Mill Co.*, 1.

11. *Contemporaneous construction by executive officers.*

A uniform practical construction given to a statute by executive officers of the government who have duties under the act, though not controlling, is, in case of doubt, entitled to much weight, especially where rights of parties have been adjusted in accordance with it. *Ter. v. Hon. R. T. and L. Co.*, 387.

12. *Municipal corporations—ordinances.*

The Territory will not be presumed to have waived its right to regulate its own property by ceding to the several counties within the Territory the right generally to pass ordinances of a police nature regulating property within their limits. *Hilo Meat Co. v. Antone*, 675

13. *Penal laws—construction—intention.*

The mere fact that the language used in a penal statute is open to two constructions, one of which would include the acts charged and the other not, does not require that the latter view must necessarily prevail, and the former view will be adopted if the court is well satisfied that such was the sufficiently expressed intention of the legislature. *Ter. v. Palai*, 133.

14. *Workmen's Compensation Act—construction.*

One purpose of the Workmen's Compensation Act is to provide compensation to a workman for injuries received while working in the business of the owner or operator thereof, from such

STATUTES—Continued.

owner or operator, regardless of questions of negligence, whether the injured workman is employed directly by the owner or operator of the business, or indirectly through a contractor, and the act must be broadly and liberally construed in order to effectuate such purpose. *In re Ichijiro Ikoma*, 291.

15. *Same—same.*

A sugar company let a contract to H to build a road-bed on its plantation to be used in its business, furnishing H with camps, tools and appliances, the work to be to the satisfaction of the company's engineer; the claimant, a workman employed by H who alone had the right to discharge him, was injured while working on the road-bed and filed with the industrial accident board his claim for compensation against the company and H; the question of the liability of the company was reserved to this court: Held, that the company is liable, it being an employer of claimant within the language and intent of the act. *In re Ichijiro Ikoma*, 291.

See APPEAL AND ERROR, 8; CONSTITUTIONAL LAW, 4.

STATUTE OF NON-CLAIM.

See EXECUTORS AND ADMINISTRATORS, 4.

STATUTORY CONSTRUCTION.

See HUSBAND AND WIFE.

STOCK DIVIDENDS.

See TRUSTS, 4, 5.

STREET RAILROADS.

1. *Honolulu Rapid Transit & Land Co.—powers under franchise act.*

The Honolulu Rapid Transit & Land Co. has power under sections 17 and 37 of the franchise act (S. L. 1898, Act 69; R. L. 1915, Secs. 784, 804) to expend so much of its income as it may desire in making extensions in and to its line of road; and to increase its capital stock to an amount equal to the actual cost of its property, including income expended therein (except such as might otherwise be payable to the Territory as its share of excess income over 8% in any one year) and money borrowed upon bond issues, plus 25% in addition to such cost. *Ter v. Hon. R. T. & L. Co.*, 387.

SUBSEQUENT PURCHASER.

See RECORDS, 2.

SUBTENANTS.

See LANDLORD AND TENANT, 6.

SUFFICIENCY OF EVIDENCE.

See **NEW TRIAL**.

SUMMARY JUDGMENT.

See **BONDS**.

SUMMARY POSSESSION.

See **APPEAL AND ERROR**, 9; **LANDLORD AND TENANT**, 7.

SURCHARGE.

See **COURTS**, 1.

TAXABLE DISBURSEMENTS.

See **COSTS**, 3, 4.

TAXATION.

1. *Enterprise for profit—net profits—depreciation.*

In ascertaining the net profits of an enterprise for profit under R. L. 1915, Sec. 1241, moneys laid out in necessary improvements, as well as the bare running expenses, are to be deducted, but a further sum for estimated depreciation of plant is not deductible. *In re Taxes Hawi Mill and Plantation Co.*, 46.

2. *Excise tax on privilege.*

The tax imposed by Sec. 3361, R. L. 1915, on insurance companies and corporations, which is computed on the gross earnings of such companies from all risks located in, and from all business done within, the Territory, is an excise tax for the privilege of doing business within the Territory. *In re taxes, Brewer & Co.*, 96.

3. *Income tax—double taxation.*

That an income is derived from commissions paid out of gross premiums received by fire insurance companies and that such companies pay a privilege tax based on the amount of such gross premiums does not render a tax on such income double. *In re taxes, Brewer & Co.*, 96.

4. *Factors to be considered.*

The earning power of an enterprise for profit is a potent factor, but not the only factor, to be considered in assessing an enterprise for profit. The value of the separate items of property making up the whole is to be taken into consideration. *In re taxes, Hawi M. & P. Co.*, 46.

5. *Privately owned property of Federal agent.*

The fact that property privately owned by an agent of the Federal government is largely used by him in the performance of his official duties does not render it exempt from territorial taxation. *Cassels v. Wilder*, 358.

TAXATION—Continued.

6. *Property on military reservation.*

Property on a United States military reservation owned by individuals is subject to taxation by the Territory. *Cassels v. Wilder*, 61.

See CONSTITUTIONAL LAW, 2, 5; MUNICIPAL CORPORATIONS, 3.

TAXPAYERS' SUITS.

See ABATEMENT AND REVIVAL.

TECHNICAL WORDS.

See WILLS, 4.

TENANTS IN COMMON.

See DEEDS, 1.

TENDER.

See SALES, 2.

TERRITORY.

See APPEAL AND ERROR, 7.

TITLE.

See SALES, 1.

TORT.

See COUNTIES, 2; PARENT AND CHILD, 2.

TRANSCRIPT.

See APPEAL AND ERROR, 4; COSTS, 4.

TRESPASS.

See REPLEVIN, 2.

TRIAL

1. *Evidence—cross-examination of witness.*

While the trial court may permit the defendant on cross-examination of a witness to go into the merits of his defense by inquiring into matters not testified to by the witness on direct examination, it is better practice not to permit him to do so. *Yoshiura v. Saranaka*, 761.

2. *Instructions.*

It is reversible error to refuse to give a requested instruction which is accurate, applicable and material to an issue involved in the case where the charge given to the jury does not cover the point. *Hustace v. Davis*, 606.

3. *Instructions—motive.*

Evidence of motive, or lack of motive, being a matter properly to be considered by the jury in a criminal case, an appropriately framed instruction on the point, if requested, should be

TRIAL—Continued.

given. The instruction requested in this case was properly refused because incomplete and misleading. *Ter v. Palai*, 133.

4. *Same—extra judicial statements—restriction of relevant evidence.*

The operation of evidence of an extra judicial statement relevant on the question of motive will not be limited by an instruction where the evidence went in generally and without objection. *Ter v. Palai*, 133.

5. *Verdict—instructions.*

A verdict cannot be said to be contrary to law because the jury supposedly overlooked certain instructions in a case where varying instructions were given to meet the facts as the jury might find them. It will be assumed that the jury found the facts to have been as contended for by the successful party. *Martin v. Wilson*, 74.

See NEGLIGENCE, 2.

TRUCKMAN.

See EXEMPTIONS.

TRUSTS.

1. *Allowance of attorneys' fees.*

Where in a controversy over the income of the corpus of a trust estate it is adjudged that such income is a separate trust arising by operation of law in favor of one of the claimants, costs and expenses of such claimants, including attorneys' fees, incurred in a suit to settle such controversy, are not allowable out of the principal or corpus of the trust estate. *Von Holt v. Williamson*, 245.

2. *Same.*

An unsuccessful claimant to a certain fund of a trust estate is not entitled to costs and expenses, including attorneys' fees, out of the corpus of the trust estate. *Von Holt v. Williamson*. 245.

3. *Appointment of trustee—judicial function.*

While a grantor of a trust cannot delegate a judicial function to any court, such function being created by law, the naked power of appointing in succession the trustees of a trust is not a judicial function but a power which may be delegated by the grantor. *In re Estate of Bishop*, 575.

4. *Corporations—apportionment of extraordinary dividends between life tenant and remainderman.*

Where shares in a corporation are left in trust for the benefit of remaindermen, the annual income therefrom being payable to another, an extraordinary stock dividend declared upon accumulated earnings of the corporation which accrued partly before and partly after the institution of the trust should be apportioned between the respective interests, so much of the divi-

TRUSTS—Continued.

dend as represents earnings which accrued after the creation of the trust, less any premium on the shares in the market immediately after the declaration of the dividend, being distributable to the person entitled to receive the income, the remainder belonging to the corpus. *Evans v. Garvie*, 651.

5. *Same—extraordinary dividend based on increased value of corporation's property.*

A stock dividend upon shares held in trust which represents a natural increase in the value of land owned by the corporation is merely a change in the form of ownership and belongs to the corpus of the trust fund. *Evans v. Garvie*, 651.

6. *Costs—trustees' commissions—principal—income.*

Under R. L. 1915, Sec. 2542, the commissions of trustees which are chargeable on principal should be paid out of the principal and those chargeable on income should be paid out of the income. *In re Estate of Ena*, 335.

7. *Evidence—weight and sufficiency.*

A constructive trust must be established by evidence which is clear, definite, unequivocal and satisfactory. Decree herein reversed on the evidence. *Kuwahara v. Kuwahara*, 273.

8. *Expense of litigation—counsel fees.*

Where conflicting interests of beneficiaries under a trust require the institution of a suit in order to determine the proper disposition of certain funds, and the litigation is for the general benefit of the parties interested in the trust, reasonable fees may be allowed to be paid to counsel for the respective parties out of the corpus of the trust estate. *Evans v. Garvie*, 694.

9. *Gifts by implication—accumulations—resulting trusts—wills.*

A testator devised and bequeathed all his property to a trustee upon trust to pay the income thereof to his wife during the term of her natural life, and from and after her death to apply so much of the income as may be necessary for the maintenance and education of his daughter until she should attain the age of twenty-one years, also to pay to his sister-in-law the sum of \$500 per annum; and if the daughter should die leaving lawful issue to pay and deliver over to such issue, if of age, the whole of the property, and if not of age, to continue to hold it, using the income therefrom for their maintenance until they should become of age, and then to deliver over the property to the issue; and after the death of the wife, sister-in-law, and daughter (if without issue), to convert the estate into money and divide the same as directed in the will. Held, that the testator did not give the income to the daughter during her life after reaching the age of twenty-one (his wife and sister-in-law having died) by implication; that he did not intend that

TRUSTS—Continued.

the income should accumulate; but that there was a resulting trust as to such income, as an undisposed of beneficial interest, in favor of the daughter as sole heir. *Von Holt v. Williamson*, 201.

See COURTS, 1; OFFICERS, 3; WILLS, 1, 7.

UNDUE INFLUENCE.

See DEEDS, 4; INSANE PERSONS; WILLS, 10.

UNKNOWN OWNER.

See LARCENY, 3.

"UNLAWFULLY."

See WORDS AND PHRASES, 6.

USURY.

See CRIMINAL LAW, 10, 11; EVIDENCE, 4, 5; INSTRUCTIONS.

VACATING DECREE.

See DIVORCE, 5.

VARIANCE.

See BRIBERY, 1; CRIMINAL LAW, 8; EJECTMENT, 2, 3; MECHANICS' LIENS, 1.

VARIATION OF INSTRUMENTS.

See CONTRACTS, 3.

VERDICT.

See APPEAL AND ERROR, 23; LIMITATION OF ACTIONS, 4; NEW TRIAL; TRIAL, 5.

VESTED REMAINDERS.

See WILLS, 11.

VOID CONTRACTS.

See CONTRACTS, 7, 8.

VOID JUDGMENTS.

See APPEAL AND ERROR, 24.

WAGES.

See CONSTITUTIONAL LAW, 1.

WAIVER.

1. *Question of law or fact.*

The question of waiver is usually a mixed one of law and fact for the jury, but where the facts are undisputed and are susceptible of but one reasonable inference it becomes one of law for the court. *Stewart v. Spalding*, 502.

See CONTRACTS, 4; EXECUTORS AND ADMINISTRATORS, 4; PLEADING, 3.

WARRANT OF ARREST.

See CRIMINAL LAW, 12.

WARRANTS.

See MUNICIPAL CORPORATIONS, 1.

WATERS AND WATERCOURSES.

1. *Appeal and error—findings of water commissioner.*

On an appeal from the decision of a water commissioner, where the determination of a question of fact depended on conflicting testimony, the finding of the commissioner ought not to be disturbed if it is supported by substantial evidence and does not appear to be against the weight of the evidence, or inherently inequitable. In this case the decision of the commissioner is affirmed upon the evidence. *Hilo Boarding School v. Ter.*, 595.

2. *Severance of flowing water from title to the land.*

The right to take water from a flowing well or stream may be separated by the owner from the title to the land by grant or reservation, and upon such separation the right to the water would become an easement in the land. But until a severance of the title, the water, in the nature of things, is part and parcel of the land, and would pass to a grantee or lessee without its being mentioned in the conveyance. *Tsunoda v. Young Sun Kow*, 660, 674.

WIDOW.

See WILLS, 9.

WILLS.

1. *Construction—appointment of trustees.*

The will of B named five trustees to execute a certain trust therein created, provided that the number of trustees should be kept at five, and provided that vacancies among the trustees should be "filled by the choice of a majority of the justices of the supreme court;" at the time the will took effect the justices, severally, exercised original jurisdiction in equity subject to appeal to the supreme court in banco; later all original jurisdiction in equity was transferred to circuit judges sitting at chambers in equity. Held, in construing the will, that it was the intention of the testatrix to vest the power of filling vacancies in the justices, as individuals, and not in the court which should exercise original jurisdiction in matters of the trust, and, consequently, that the transfer of sole original jurisdiction to circuit judges at chambers in equity did not transfer from the justices of the supreme court to the circuit judge the power of filling vacancies among the trustees under the will. *In re Estate of Bishop*, 575.

WILLS—Continued.

2. *Same—words and phrases.*

Where an instrument creating a trust named trustees, fixed the number of trustees and provided that vacancies among the trustees "should be filled by the choice of the majority of the justices of the supreme court," the word 'choice' therein is synonymous with and means "appoint," and an appointment so made is not subject to confirmation or rejection by the circuit judge exercising original jurisdiction in matters relating to the trust. *In re Estate of Bishop*, 575.

3. *Construction—conflicting clauses—general and specific provisions.*

A conflict between two provisions in a will is not to be regarded as irreconcilable unless, after the application of the several rules of construction, substantial harmony is found impossible. Where there is an inconsistency between a general and a specific provision both may operate, the latter upon the property named in it and the former upon other property. *Lidgate v. Danford*, 317.

4. *Construction—technical words.*

The technical meaning of words used in a will may be subordinated to the real intent of the testator, but the presumption is that technical words were used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary. *Kinney v. Oahu Sugar Co.*, 747.

5. *Contest—trial by jury—directing verdict.*

Upon the trial in the circuit court upon appeal from a judge sitting as a court of probate in the matter of the probate of a contested will, the contestant is entitled to have the issues tried by a jury, but the court may in proceedings of this sort, where the facts of the case require it, direct a verdict. *In re Will of Kalua*, 149.

6. *Devise to children as a class.*

A testator by his will gave his residuary estate "in equal shares to all my children who shall be living at my decease." Held, that the term "children" must be construed in its proper sense as designating the immediate offspring, and this construction is unaffected by the fact that at the time of the making of the will, and at his death, there was living a grandchild of the testator's, the son of a deceased daughter, who but for the will would have been entitled as an heir at law to share in the estate of his grandfather. *In re Estate of Hartwell*, 213.

7. *Distribution per capita.*

Where the income from certain property devised in trust is directed to be paid to the children and certain named grandchildren of the testator in equal shares the beneficiaries will

WILLS—Continued.

take *per capita* unless the will shows a different intent on the part of the testator. *Lidgate v. Danford*, 317.

8. *Mortgage by remainderman—termination of mortgagor's estate.*

B., by will, devised his real estate to his wife for life, and after her death certain portions to his son W. K. B.; the will provided that if any devisee should die before the testator's wife died the share which otherwise would have fallen to such devisee should go to his heirs; W. K. B. mortgaged the property so devised to him, after which he died prior to the death of the widow of testator, leaving children surviving him who are admitted to be his heirs: Held, that whatever estate W. K. B. took under the will terminated with his death and that his surviving children, as heirs, took free from any lien of such mortgage. *Brede v. First Nat. Bank*, 537.

9. *Refusal of widow to accept testamentary provision—acceleration.*

Where a will provides for the payment to the testator's widow for life of a share of the income of the residue of the estate which is devised in trust, such income, upon her death, to be paid to other beneficiaries, and the widow elects to take her dower, the other beneficiaries become immediately entitled to receive all the income from so much of such property as may remain. *Lidgate v. Danford*, 317.

10. *Undue influence—evidence.*

Where in the contest of a will the only evidence tending to show undue influence was testimony that the attorney who, acting under the instructions of testatrix, drew the will was a member and trustee of a church organization which was named as one of the beneficiaries in the will; and that such attorney, having himself first declined the request of testatrix that he act as executor and trustee under the will, suggested the name of a trust company to act in that capacity, which suggestion was adopted and acted upon by the testatrix, the evidence wholly fails to show any undue influence with respect to the making of the will and was insufficient to submit the issue to the jury. *Re Will of Kalua*, 149.

11. *Vested remainder—defeasance—condition impossible of performance.*

Where by a last will and testament a remainder in fee is vested in a devisee subject to defeasance by a condition subsequent and prior to the performance of the condition such condition becomes impossible of performance, the vested remainder becomes absolute in the devisee and no longer subject to the defeasance provided for in the will. *Scott v. Lucas*, 338.

See EXECUTORS AND ADMINISTRATORS, 1; TRUSTS, 9.

WITNESSES.

1. *Proof of handwriting.*

A witness who is called on to prove handwriting merely by comparison of hands must be shown to be an expert and it is error to permit one who has not qualified as such to testify as an expert. *Hee Fat v. Wong Kwai*, 328.

See CONSTITUTIONAL LAW, 3; CRIMINAL LAW, 3; LARCENY, 1, 2; TRIAL, 1.

WITNESS FEES.

See COSTS, 4.

WORDS AND PHRASES.

1. *"Actual cost."*

The term "actual cost" means money actually paid out, or "real cost." It may be considered as synonymous with "expense" and as excluding all profit. *Ter. v. Hon. R. T. & L. Co.*, 387.

2. *"Any person."*

The words "any person," as used in Sec. 2801 R. L. 1915, relating to garnishment, include municipal corporations. *Teves v. Reade*, 564.

3. *"Children."*

The general construction of the word "children" accords with its popular signification, namely, as designating the immediate offspring. *In re Estate of Hartwell*, 213.

4. *"Heirs of the body."*

The phrase "heirs of the body" is the ordinary, proper and technically accurate one to use in the creation of an estate in fee tail. *Kinney v. Oahu Sugar Co.*, 747.

5. *"Limited."*

The word "limited," when used with reference to the creation of an estate in real property, means "defined." *Kinney v. Oahu Sugar Co.*, 747.

6. *"Unlawfully."*

The words "unlawful" and "unlawfully" are commonly used as meaning "without authority of law" or "not permitted by law." *Ter. v. Palai*, 133.

See CHATTEL MORTGAGES; LANDLORD AND TENANT, 3; WILLS, 2.

WORKMEN'S COMPENSATION ACT.

See DAMAGES, 4; STATUTES, 14, 15.

WRIT OF ERROR.

See APPEAL AND ERROR, 1, 7, 9.

WRIT OF POSSESSION.

See LANDLORD AND TENANT, 7.

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